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Supreme Court, U.S.
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In The

Supreme Court of the United States

CHRISTOPHER F. COREY,

Petitioner,

v.

MELNOR, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

JEFFREY R. SIEGEL
THE SIEGEL LAW FIRM
4745 W. 136th Street, Suite 109
Leawood, KS 66224
Tel: (913) 402-6037
Fax: (913) 402-6038
jeff@siegel-legal.com
Attorney of Record for Petitioner Christopher F. Corey

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

ISSUE FOR REVIEW

Whether a debtor's default in creditor's fraud action in federal district court can preclude debtor from contesting dischargeability of debt in adversary proceeding by application of collateral estoppel in that the issue of fraud has not been actually litigated. 11 U.S.C. § 523(a)(2)(A).

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BASIS OF JURISDICTION

This is a Petition for Certiorari from a judgment entered September 30, 2009 by the United States Court of Appeals for the Tenth Circuit, and this Court has jurisdiction by virtue of 28 U.S.C. § 1254.

STATUTES INVOLVED

Exceptions to Discharge

(a) A discharge under sections 727, 1141, 1228(a), 1228(b) or 1328(b) does not discharge an individual debtor from any debt –

(2) for money, property, services, or an extension, renewal or refinancing of credit to the extent obtained by –

(A) false pretenses, a false representation or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;

. . .

11 U.S.C. § 523(a)(2)(A)

STATEMENT OF THE CASE

Creditor/Respondent Melnor, Inc. instituted an adversary proceeding in the United States Bankruptcy Court for the District of Kansas against Debtor/Petitioner Christopher Corey on May 23, 2007. The Complaint alleged that Respondent obtained a judgment for fraud against Mr. Corey in the United States District Court for the Western District of Virginia (the "Virginia action") on May 24, 2005. The adversary proceeding sought to deny discharge of the Melnor claim on the ground of fraud, 11 U.S.C. § 523(a)(2)(A), by using the Virginia default judgment to collaterally estop relitigation of the issue.

The Virginia Complaint asserted three counts: Fraud, Unjust Enrichment and Constructive Fraud, and arose out of a barter arrangement dated July 19, 2003 between Melnor (doing business in Virginia) and SKR (doing business in Kansas), Mr. Corey's former employer. Mr. Corey signed the barter agreement on SKR's behalf. Mr. Corey was president of SKR, was never a shareholder of the company and resided in Kansas. Melnor alleged in the Virginia action that Mr. Corey failed to disclose SKR's lack of ability to complete the barter arrangement, and therefore defrauded it. Without a detailed discussion of the distinction between contract and tort remedies, it is plain that the Virginia action was nothing more than a breach of contract action dressed up to look like fraud in that all it alleged was nonperformance.

SKR hired an attorney to represent it and Mr. Corey in the Virginia action, Steffanie J. Lewis of the International Business Law Firm, PC in Washington, D.C., who entered a special appearance to contest jurisdiction on Mr. Corey's behalf by way of a Motion to Dismiss. After that motion was denied, SKR went out of business, and ultimately filed for bankruptcy, (*In re: SKR Resources, Inc.*, United States Bankruptcy Court for the District of New Jersey, Case No. 06-16631-DHS, filed July 20, 2006). Melnor filed no claim in the SKR bankruptcy.

Without funds to pay counsel and with SKR defunct, Mr. Corey, now out of a job and living in Kansas, attempted to represent himself in the Virginia action. On November 20, 2005, Ms. Lewis moved to withdraw as counsel for Mr. Corey, which was granted on December 9, 2005. Mr. Corey is not a lawyer, and his Answer and all later documents in the Virginia action were filed by him *pro se*. Mr. Corey's declaration filed in Opposition to the Motion for Summary Judgment describes his situation: "After Ms. Lewis's withdrawal, I could not afford to hire another lawyer in Virginia, and represented myself in the Virginia action. I am not a lawyer, and did not have the knowledge and expertise to adequately represent myself." Mr. Corey tried the best he could, attempting to comply with the required procedures and his responsibilities as a litigant. This effort worked against him since the Bankruptcy Court, the Bankruptcy Appellate Panel and the Tenth Circuit

used this dire situation to support the finding that Mr. Corey had a "full and fair opportunity to litigate" and engaged, however, awkwardly and ineffectively, in the litigation process. In its Opinion, the Tenth Circuit never even mentioned that Mr. Corey was a *pro se* litigant in a far away Court.

The *Pro Se* Answer is clearly the work of a nonlawyer. For example, the first denial is "I don't know about Melnor's corporate existence." However, the Answer responds to each paragraph in the Complaint, number by number. It then has a section entitled "Affirmative Defenses," and states defenses which are more than denials of fact, such as fraud and failure to state a claim.

On May 4, 2006, the District Court in Virginia struck Mr. Corey's defenses as a sanction pursuant to Fed.R.Civ.P. 37(b) for a "course of obstructive behavior." *However, the Court did not strike Mr. Corey's Answer or denials.* The Court did not intend by this to enter default against Mr. Corey as a sanction. We know this because it entered default for nonappearance at trial three weeks later, and in referencing Rule 37(b), it specifically ruled out a number of other authorized sanctions listed under Rule 37(b)(2)(A), including "default judgment against the disobedient party." Rule 37(b)(2)(A)(vi).

On May 23, 2006, however, Mr. Corey, without counsel and without money, failed to appear in Virginia for trial. The trial court's Memorandum Opinion stated: "By order entered April 5, 2006, the court

entered default judgment against SKR, and by order entered May 4, 2006, the court struck Corey's defenses as a sanction for his course of obstructive behavior . . . The court was set to proceed to trial on the sole issue of damages on May 23 . . . the court assembled a jury . . . However, Mr. Corey did not appear, the court declared Mr. Corey to be in default." [Memorandum Opinion, Virginia Action, May 24, 2006].

To satisfy the requirements of Fed.R.Civ.P. 55, the Court heard from only one witness, Juergen Nies, Melnor's president.

> Nies testified that Melnor transferred goods worth $433,014.97 to SKR and Corey but ultimately received services worth only $4,390.90 in return. Melnor offered supporting documentation, including bills of lading detailing each of the shipments to SKR. Nies testified that Melnor was seeking an award of $428,624.07 in compensatory damages against Corey to cover the difference between the value of the goods transferred by Melnor and the value of the services received in return (footnote omitted). Having heard Nies's testimony and having reviewed the supporting documentation, the Court finds that Melnor is entitled to compensatory damages in that amount.

[Memorandum Opinion, Virginia Action, May 24, 2006]. Default judgment was then entered against Mr. Corey for $428,624.07, plus attorney's fees of $94,357.84, based on a contract to which he was not a

party. Mr. Corey will never be able to pay off this judgment and this harsh result will hover over him and his family all his life.

In summary to this point:

1) Mr. Corey's defenses were stricken on May 4, 2006 as a discovery sanction. Default was not entered until May 24, 2006, for not appearing at trial, as the Court expressly stated. Judgment was not entered as a sanction of any kind, and the denials in his *pro se* Answer stood at the time of trial; and,

2) Evidence was taken from a single witness on the issue of damages only. No evidence was taken on any of Respondent's claims, including fraud, *which was never litigated*. Mr. Corey never had his day in court on the fraud claim.

On August 8, 2007, Mr. Corey filed his Motion to Dismiss the Complaint in the Bankruptcy Court. The basic argument set forth in the Motion to Dismiss was that Respondent's complaint failed to state a claim for nondischargeability of the Melnor debt for fraud because the Virginia judgment could not support the application of collateral estoppel because the issue was not "actually litigated." The limited and questionable exception, for which there is a split in jurisdictions, and on which Respondent's action depends, allows a default judgment to have collateral estoppel effect if it was granted "as a sanction for substantial abuse of the discovery process." *In re: Jordana*, 232 B.R. 469, 477 (B.A.P. 10th Cir. 1999). However, the Virginia court never granted a default

judgment against Mr. Corey as a sanction for anything. The express reason for the default was for failing to show up at trial three weeks after a different, and the only, sanction was imposed. Respondent opposed the Motion to Dismiss.

Before the Bankruptcy Court ruled on the Motion to Dismiss, Respondent filed a Motion for Summary Judgment on October 17, 2007, arguing that the exception barred dischargeability of the Virginia judgment. Mr. Corey filed his Opposition and a Declaration in Opposition on October 30, 2007 which also contained a cross-motion for summary judgment.

On December 21, 2007, the Bankruptcy Court issued its Memorandum Opinion and Order on Petitioner's Motion to Dismiss, Respondent's Motion for Summary Judgment and Petitioner's Cross Motion for Summary Judgment ("Memorandum Order" Appendix p. 34). The Court granted Melnor's summary judgment motion denying discharge of debt. Judgment was entered on December 21, 2007. Notice of Appeal was timely filed by Mr. Corey on December 22, 2007.

Mr. Corey appealed to the Tenth Circuit Bankruptcy Appellate Panel, which affirmed. He then appealed the decision of the B.A.P. to the Tenth Circuit, which also affirmed.

ARGUMENT

This Court Should Consider This Case As There Is A Split In Jurisdictions (Between The Bankruptcy Court Of Virginia, And Several Circuits) On The Issue Presented, And The Issue Arises With Sufficient Frequency As To Deserve Uniformity And Clarification.

The Courts that support the view that a default judgment entered by a United States District Court may have collateral estoppel effect in a subsequent adversary proceeding have carved out an exception to this Court's clear statement that a default judgment cannot be used for collateral estoppel purposes, *Arizona v. California,* 530 U.S. 392, 416 (2000), by deleting, or modifying, the "actually litigated" requirement of collateral estoppel, and substituting the "full and fair opportunity to litigate" prong of the test for *res judicata*. In some cases, the courts have completely confused the concepts of collateral estoppel and *res judicata*.

The preclusive effect given in federal court to a prior federal judgment is subject to federal law. *Dodge v. Cotter Corp.*, 203 F.3d 1190 (10th Cir. 2000).

> One of the major distinctions between the federally-applied rules of collateral estoppel and the rules commonly applied in many states is whether a default judgment constitutes a "litigated" claim. The federal rules require the matter to be "actually" litigated,

> whereas many states permit a default judgment to have collateral estoppel effect.

Norton, *Bankruptcy Law and Practice 2d* § 47:72.

"It is the general rule that issue preclusion attaches only '[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment.' Restatement (Second) of Judgments § 27, p. 250 (1982). 'In the case of a judgment entered by confession, consent, or default, none of the issues is actually litigated. Therefore, the rule of this Section [describing issue preclusion's domain] does not apply with respect to any issue in a subsequent action.' *Id.*, comment *e*, at 257." *Arizona v. California*, 530 U.S. 392, 416 (2000).

> In contrast to *res judicata*, the doctrine of collateral estoppel, also known as issue preclusion, "attaches only '[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment.'" *Arizona v. California*, 530 U.S. 392, 414, 120 S.Ct. 2304, 147 L.Ed.2d 374 (2000) (quoting Restatement (Second) of Judgments § 27, at 250 (1982)).

B-S Steel of Kansas, Inc. v. Texas Industries, Inc., 439 F.3d 653, 662 (10th Cir. 2006).

However, prior to this case, the Tenth Circuit applied different elements of collateral estoppel: 1) the issue previously decided is identical with the one

presented in the action in question; 2) the prior action has been finally adjudicated on the merits; 3) the party against whom the doctrine is invoked was a party or in privity with a party to the prior adjudication; and, 4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action. *See, Murdock v. Ute Indian Tribes*, 975 F.2d 683 (10th Cir. 1992). This Court's "actually litigated" requirement had disappeared.

The Tenth Circuit corrected itself in word only in this case, applying the collateral estoppel test as set forth by this Court, but instead of honoring the "actually litigated" requirement, it carved out an exception such that if one participates in the litigation process, all that is needed to satisfy the "actually litigated requirement" of collateral estoppel, is a "full and fair opportunity to litigate," as used in *res judicata*. It is worthwhile to pause at this moment and ask oneself the question: "When does a litigant in an American court not have a full and fair opportunity to litigate?"

The difference in how collateral estoppel is stated and applied is critical. If a litigant only needs a "fair opportunity to litigate" an issue, it need not have "actually litigated" that issue. If there is an "actually litigated" requirement, then "fair opportunity to litigate" eliminates the requirement. Either the issue was actually litigated (i.e., evidence was heard and a verdict rendered), or it was not. Having an opportunity to do a thing is not tantamount to having done it.

The exception carved out to the "actually litigated" requirement, thus giving a default judgment collateral estoppel effect, has been applied where a default judgment is granted "as a sanction for substantial abuse of the discovery process." *In re: Jordana*, 232 B.R. 469, 477 (B.A.P. 10th Cir. 1999).

The problem results from imprecise analysis. The courts that grant preclusive effect to default judgments which are the result of obstructive conduct confuse the "actually litigated" requirement of collateral estoppel, with the "full and fair opportunity to litigate" element of *res judicata*.

In *In re: Gilson*, 250 B.R. 226 (E.D. Va. 2000), Plaintiff/Creditor sued Defendant/Debtor in the United States District Court. Defendant filed her answer, but failed to respond to discovery. The District Court entered default as a discovery sanction. Judgment was subsequently entered on the default, and Defendant filed bankruptcy. The court accurately analyzed the confusion arising from the failure of courts to employ precise language in distinguishing collateral estoppel from *res judicata*.

> FIC argues that the debtor had a full and fair opportunity to litigate the matters in the district court and that this full and fair opportunity meets the "actually litigated" requirement. This argument cannot be accepted. *Every defendant has a full and fair opportunity to defend himself. If he does not, he will probably have been denied his due*

process rights under the Fourteenth Amendment. A full and fair opportunity to defend oneself includes, among other things, the opportunity to file an answer, present witnesses and cross-examine witnesses. While every litigant has these rights, many do not exercise them, especially in collection cases. The issue in these cases is not so much whether the debt is owed but whether the creditor can gain access to the court's collection remedies such as garnishment and levy.

The creditor's argument simply proves too much. The argument eliminates one of the critical differences between *res judicata* and collateral estoppel. *Res judicata* bars all claims that were or might have been presented and all defenses that were or might have been presented as though they had been actually litigated. Collateral estoppel only bars issues actually litigated. To change the collateral estoppel "actually litigated" requirement to a mere "opportunity to fully and fairly participate" requirement would change a critical element of collateral estoppel and transform it substantially into *res judicata.* To preclude relitigation of particular issues which a party had a full and fair opportunity to litigate but which were not actually litigated would, in dischargeability cases, block "unexplored paths that may lead to truth." *Felsen*, 442 U.S. at 132, 99 S.Ct. at 2210. This was one of the important reasons why the application of *res judicata* was rejected by the Supreme Court

> in bankruptcy dischargeability cases in *Felsen* and why the "actually litigated" requirement of collateral estoppel ought not be eroded.

In re: Gilson, 250 B.R. at p. 233. (Emphasis added).

This imprecision appears frequently in the case law, and has appeared in this context. *See*, *Elletson v. Riggle (In re: Riggle)*, 2007 WL 2332141 (D. Colo. 2007) and its discussion of *In re: McMahon*, 356 B.R. 286 (Bkrtcy. N.D. Ga. 2006) reversed *Colorado West Transp., Inc. v. McMahon*, 2007 WL 4765020 (N.D. Ga. 2007). Moreover, the exception to the "actually litigated" requirement leads to a broader fraud exception to discharge, which results in unclear, unfocused and inconsistent factual analysis of the type of obstructive conduct supporting the exception. In other words, "actually litigated" no longer means "actually litigated" at all; it now means opportunity to litigate.

> The present case points to some of the difficulties of *Daily, Bush* and their progeny. How much obstreperous or bad faith conduct precludes subsequent dischargeability litigation? Is the standard objective misconduct or subjective intent? . . .
>
> There are many reasons why defendants choose not to proceed in civil litigation. All litigants are aware when they make that decision that a default judgment will probably be entered against them. It is, however, difficult to discern when "participation" becomes "substantial participation" and would

satisfy an "actually litigated" requirement. It is also difficult, especially if the defendant does not participate, to determine the defendant's motive . . . It may be that a defendant engages in significant discovery only to find that all of the facts are not what he thought they were originally or that the plaintiff's case is much stronger than he had originally understood. These actions can be undertaken in good faith. They must comply with F.R.Civ.P. 11. *However, at some point, he may determine that he will inevitably lose or that further effort is not worth the costs involved. At that point, he may well become in default of his discovery obligations with the inevitable result following. Merely examining the record of the litigation may not be sufficient to determine the subjective intent of a defendant. Must a defendant, at the time of a default hearing, prove that his prior conduct was not in bad faith so that he will not be precluded from contesting the dischargeability of the default judgment in a subsequent hypothetical bankruptcy? Must a plaintiff seek to prove such bad faith at a default hearing to protect the default judgment in a subsequent hypothetical bankruptcy?* An individual's intent may well not be expressed and must be inferred from his conduct or the circumstances. Applying collateral estoppel based on subjective intent does not necessarily permit the discovery of the truth of the underlying matter, the alleged nondischargeable debt, particularly

> where the defendant because of his default is not present.
>
> Moreover, even though the sanction judgments will be given *res judicata* effect in other non-bankruptcy litigation, the effect of the *Daily* and *Bush* holdings is to enlarge the ambit of § 523 without a hearing on the merits of the § 523 complaint. Nowhere in § 523 is failure to comply with discovery listed as a nondischargeable obligation. An obligation is not dischargeable because, for example, the original obligation was incurred fraudulently, not because a debtor was recalcitrant in admitting his obligation or in honoring it. Courts have the ability to resolve discovery and other pleading abuses promptly and effectively without adding a not always obvious potential nondischargeability issue to a future hypothetical bankruptcy. This is not necessary and impinges on the carefully drafted and balanced Bankruptcy Code. In *Daily, Bush,* and this case, the defendants suffered the ultimate sanction, a judgment. While outside bankruptcy, the judgment is *res judicata* for all other purposes, bankruptcy presents a different situation.

In re: Gilson, 250 B.R. at pp. 234-236. (Emphasis added).

Neither the Bankruptcy Court nor the Virginia Court inquired into Mr. Corey's intent, or the reasons for his litigation problems, despite the fact that he was a nonlawyer acting *pro se,* was out of a job, broke,

could not afford a lawyer and would be required to travel from Kansas to Virginia for every hearing and trial. Mr. Corey ran out of money and resources. Must he continue to litigate just because he started to litigate?

The Bankruptcy Court ignored these facts, as has the Tenth Circuit in finding that Mr. Corey failed to appear at trial "without excuse." There was no bad intent or deliberate obstruction. He just could not afford to fly to Virginia for all the hearings. It is precisely this type of party caught in desperate circumstances that the "actually litigated" requirement protects.

In *Marlee Electronic Corp. v. Antonakis* (*In re: Antonakis*), 207 B.R. 201 (E.D. Cal. 1997), the court declined to apply collateral estoppel where a creditor moved for summary judgment to have a $22,000,000 debt declared nondischargeable based on a default judgment after the debtor had participated in litigation. The Court stated:

> Finally, even if, as a matter of law, issue preclusion were available in this case, this court would exercise its discretion and decline to apply it: it would serve neither the purposes of the issue preclusion doctrine itself nor those of the bankruptcy code. As to the former, requiring Marlee to address the elements of a nondischargeability claim would subject Marlee to very little cumulative or duplicative litigation; although Marlee incurred significant pretrial expense

> in its earlier suit, whatever discovery transpired was never put to use before the District Court. Marlee may readily marshall any of that material before this court now.
>
> Additionally, from all that appears in the record, the Debtor suffered a default judgment only after he ran out of funds with which to pay counsel. A debtor should not be denied the protection of the bankruptcy code due to the very fact that he or she is insolvent. Nor should a debtor be denied a bankruptcy discharge until at least one court has ruled on the merits of any claim of improper conduct. This court is well-equipped to expeditiously resolve whether or not the actions of the Debtor fall within the nondischargeability provisions.

Marlee Electronic Corp. v. Antonakis (*In re: Antonakis*), 207 B.R. at 206.

This is precisely the order of things between the parties here. There has never been presentation of evidence on the issue of fraud. There has never been a judicial finding that Mr. Corey committed fraud based on evidence. That was accomplished by way of default. Mr. Corey could not put up a competent *pro se* legal defense because he was not a lawyer. Melnor is not prejudiced by having to prove fraud for the *first* time, and Mr. Corey should be permitted to have a court take a look at the merits and judge the facts before he is saddled for the rest of his life with a judgment that he can never satisfy.

The Tenth Circuit points to other Circuits to supports its view, and relies most specifically on *In re: Daily*, 47 F.3d 365 (9th Cir. 1995). However, in that case, the court turned collateral estoppel into *res judicata*.

"A party who deliberately precludes resolution of factual issues may be bound, in subsequent, related proceedings involving the same parties and issues, by a prior judicial determination reached without completion of the usual process of adjudication. In such a case the 'actual litigation' requirement may be satisfied by substantial participation in an adversary contest in which the party is afforded a reasonable opportunity to defend himself on the merits but chooses not to do so." *In re: Daily*, 47 F.3d at 368. First, how can a litigant "preclude resolution of factual issues?" All the trial court must do is set a trial date. If it were possible for a litigant to prevent factual issues from coming to trial, then what guilty criminal defendant or civil defendant with a weak case would allow it? Second, every defendant who enters a federal court gets a "reasonable opportunity to defend himself." Collateral estoppel requires that he do so and have a trial where evidence is presented on the issue; *res judicata* requires that he have the opportunity to do so. In substance, the Ninth Circuit has turned "actual litigation" into "opportunity to litigate," and has explicitly said so.

The same twisting of the plain language of "actual litigation" takes place in *In re: Bush*, 62 F.3d 1319 (11th Cir. 1995). Hanging its reasoning on the

fact that the debtor engaged in some litigation, but not trial where evidence would have been produced and he would have had the right to contest it and offer evidence of his own, the Court held that some litigation was enough to satisfy "actual litigation." But as pointed out in *In re: Shriver*, 218 B.R. 797 (E.D. Va 1998), "the Eleventh Circuit specifically acknowledged its holding in *Bush* to be inconsistent with the view typified by the Restatement comment that '[i]n the case of a judgment entered by . . . default, none of the issues is actually litigated. *Bush*, 62 F.3d at 1323 (quoting Restatement (Second) of Judgments § 27 cmt. e)." *In re: Shriver*, 218 B.R. at 802.

CONCLUSION

This issue arises with fair frequency, and the law requires clarification. The words "actually litigated" are not obscure, they are plain. They mean a trial, i.e., a proceeding where evidence is considered and a verdict returned. Several Circuit Courts ignore this; while District and Bankruptcy Courts try to honor the basic right to trial. A defendant should not be punished for doing the best he can, or for partially participating, then giving up, or even delaying matters as a tactic, and then giving up. Litigation costs money, and each of the parties involved in the cases discussed here, and Mr. Corey, ended up in bankruptcy for a reason. To punish Mr. Corey with a judgment he can never overcome, without his day in court, is precisely

what the "actual litigation" requirement is designed to avoid. Melnor never proved its case in any court because "actually litigated" has come to mean "opportunity to litigate," which (we hope) each and every person has in American courts anyway.

Respectfully submitted,

JEFFREY R. SIEGEL
THE SIEGEL LAW FIRM
4745 W. 136th Street, Suite 109
Leawood, KS 66224
Tel: (913) 402-6037
Fax: (913) 402-6038
jeff@siegel-legal.com
Attorney for Petitioner
Christopher F. Corey

583 F.3d 1249

United States Court of Appeals,
Tenth Circuit.
In re Christopher F. COREY, Debtor.
Melnor, Inc., Plaintiff-Appellee,
v.
Christopher F. Corey, Defendant-Appellant.
No. 08-3309.

Sept. 30, 2009.

Submitted on the briefs:*

Jeffrey R. Siegel, The Siegel Law Firm, Kansas City, MO, for Defendant-Appellant.

Colin N. Gotham, Evans & Mullinix, P.A., Shawnee, KS, for Plaintiff-Appellee.

Before HARTZ, Circuit Judge, BRORBY, Senior Circuit Judge, and TYMKOVICH, Circuit Judge.

HARTZ, Circuit Judge.

This adversary proceeding in bankruptcy has its origin in a suit for fraud brought by Melnor, Inc. against Christopher R. Corey in the United States District Court for the Western District of Virginia. Litigation misconduct by Mr. Corey led the district court in that case to strike his defenses. When Mr.

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R.App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

Corey failed to appear for the trial on damages, the court dismissed the jury and assessed damages based on evidence submitted by Melnor.

Mr. Corey then filed in the bankruptcy court for the District of Kansas a petition for relief under Chapter 7 of the Bankruptcy Code. Melnor brought this adversary action contending that Mr. Corey's debt to it was undischargeable because of his fraud. *See* 11 U.S.C. § 523(a)(2)(A). The bankruptcy court granted Melnor's motion for summary judgment, holding that under the doctrine of issue preclusion the Virginia judgment barred Mr. Corey from contesting that his debt was incurred through fraud. *See Melnor, Inc. v. Corey (In re Corey),* Nos. 07-20462, 07-6118 2007 WL 4563432, (Bankr.D.Kan. Dec. 21,2007) (unpublished). The Tenth Circuit Bankruptcy Appellate Panel (BAP) affirmed. *See Melnor, Inc. v. Corey (In re Corey),* 394 B.R. 519 (10th Cir. BAP 2008).

Mr. Corey appeals, contending that issue preclusion is not available to Melnor because the fraud claim was resolved through a default and therefore was not actually litigated. We disagree and affirm. Mr. Corey actually litigated Melnor's fraud claim. The default was not entered because of Mr. Corey's failure to contest the issue but rather because his efforts in contesting it were abusive.

I. DISCUSSION

On appeal from a BAP decision, we review matters of law de novo and review the bankruptcy court's factual findings for clear error. *See In re Warren*, 512 F.3d 1241, 1248 (10th Cir.2008). The pertinent facts are not in dispute and the only issue before us is one of law – namely, the propriety of the bankruptcy court's application of issue preclusion.

The doctrine of issue preclusion prevents a party that has lost the battle over an issue in one lawsuit from relitigating the same issue in another lawsuit. Generally speaking, it is not unfair to deny a litigant a second bite at the apple, and preclusion conserves resources and provides consistency in judicial decisions. Because we are here concerned with the preclusive effect of a federal-court judgment, federal law applies. *See Dodge v. Cotter Corp.*, 203 F.3d 1190, 1197 (10th Cir.2000).

Under federal law, "issue preclusion attaches only '[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment.'" *Arizona v. California*, 530 U.S. 392, 414, 120 S.Ct. 2304, 147 L.Ed.2d 374 (2000) (quoting Restatement (Second) of Judgments § 27, at 250 (1982)) (brackets in *Arizona*). *Accord B-S Steel of Kansas, Inc. v. Texas Indus., Inc.*, 439 F.3d 653, 662 (10th Cir.2006). Mr. Corey challenges only whether his commission of fraud was "actually litigated" in Virginia.

Mr. Corey's challenge finds some support in the Supreme Court's opinion in *Arizona*. Holding that a consent judgment did not have issue-preclusive effect, the Court said: "'In the case of a judgment entered by confession, consent, or *default,* none of the issues is actually litigated. Therefore, the rule of this Section [describing issue preclusion's domain] does not apply with respect to any issue in a subsequent action.'" *Arizona,* 530 U.S. at 414, 120 S.Ct. 2304 (quoting Restatement (Second) of Judgments § 27 cmt. e) (emphasis added; brackets in *Arizona*).

The context of the language quoted from the Restatement, however, makes clear that the type of "default" being considered was not a default imposed as a sanction but a default resulting from an affirmative decision not to contest a matter. The opening paragraph of comment e to § 27 of the Restatement provides the rationale for not applying issue preclusion to a defaulting party:

> A judgment is not conclusive in a subsequent action as to issues which might have been but were not litigated and determined in the prior action. *There are many reasons why a party may choose not to raise an issue, or to contest an assertion,* in a particular action. The action may involve so small an amount that litigation of the issue may cost more than the value of the lawsuit. Or the forum may be an inconvenient one in which to produce the necessary evidence or in which to litigate at all. *The interests of conserving judicial resources, of maintaining consistency,*

> *and of avoiding oppression or harassment of the adverse party are less compelling when the issue on which preclusion is sought has not actually been litigated before. And if preclusive effect were given to issues not litigated, the result might serve to discourage compromise, to decrease the likelihood that the issues in an action would be narrowed by stipulation, and thus to intensify litigation.*

(emphasis added). Clearly, this passage is referring to unraised or uncontested issues. When, in contrast, the opposing party has already been subjected in an earlier proceeding to "oppression or harassment" that caused the court to declare a default on an issue, there is a compelling reason not to impose on that party again with respect to the same issue. And basing preclusion on a default imposed as a sanction can hardly "discourage compromise" or tend "to intensify litigation."

With this legal background in mind, we examine what happened in the Virginia litigation. The event precipitating the default was apparently Mr. Corey's failure to appear at a hearing on a date that he had proposed. The magistrate judge's Report and Recommendation described the event as follows:

> Upon Christopher Corey's proposal of March 28, 2006 as a suitable date to conduct a hearing on outstanding pretrial motions, the undersigned scheduled a hearing on his outstanding motion to compel. On March 10, 2006, a notice of hearing was sent to Corey via the United States Postal Service and to

> counsel for plaintiff by electronic means. Without providing the court, or the opposition counsel with notice that he would not be present at the hearing, Corey simply did not appear at the March 28, 2006 hearing.

Aplt.App. at 58. The magistrate judge proposed striking Mr. Corey's defenses as a sanction. The district court agreed that Mr. Corey's course of conduct throughout the litigation justified the sanction. It wrote:

> Melnor essentially claims that [Corey's business] and Corey accepted over $400,000 in merchandise in exchange for services they never intended to provide. However, the record reflects a pattern of behavior on the part of the defendants seemingly aimed at preventing the court from ever reaching the merits of that claim. . . . The record shows that Corey has obstructed the course of discovery by preventing the court from setting and completing essential hearings and by attempting to excuse his behavior by incredibly asserting that he has not received the court's notices. The court finds that striking Corey's defenses and moving forward to the issue of damage is the only way the court can advance this case toward its ultimate resolution. The court is satisfied that any lesser sanction would only enable further delays by Corey. Accordingly, the court ADOPTS [the magistrate judge's] Report and Recommendation in its entirety and hereby STRIKES Corey's defenses.

Id. at 99. The court set the issue of damages for jury trial. But when Mr. Corey failed to appear for trial, the court dismissed the jury, heard Melnor's evidence, and assessed damages, including an award of attorney fees under Virginia law, which authorizes such an award to a successful plaintiff in a suit for fraud.

In our view, the circumstances of the Virginia litigation justify precluding Mr. Corey from litigating in the bankruptcy court whether he committed fraud against Melnor. The purposes of issue preclusion are promoted by such preclusion: Melnor is not again subjected to the burdens of litigating the fraud issue and the fraud issue is resolved consistently by the two courts. Moreover, imposing preclusion on Mr. Corey is neither unfair to him nor likely to discourage constructive behavior (such as compromise in litigation); on the contrary, applying preclusion doctrine here is likely to discourage obstructive and delaying tactics.

In similar circumstances other circuits have reached the same conclusion. In *Federal Deposit Insurance Corp. v. Daily (In re Daily),* 47 F.3d 365, 368 (9th Cir.1995), the Federal Deposit Insurance Corporation (FDIC) objected to the dischargeability of a debt arising from a default judgment obtained against Daily in a federal racketeering suit. In the previous lawsuit the district court ordered the allegations of the complaint admitted and entered a default judgment on the grounds that "Daily's failure to provide discovery was the result of a deliberate, dilatory course of conduct . . . and . . . [his] strategy of

delay and evasiveness had significantly prejudiced the [FDIC] and had significantly interfered with the judicial process." *Id.* at 367 (internal quotation marks, ellipses, and brackets omitted). The Ninth Circuit agreed with the bankruptcy court that issue preclusion applied. It wrote:

> The judgment entered . . . was not an ordinary default judgment. Daily did not simply decide the burden of litigation outweighed the advantages of opposing the FDIC's claims and fail to appear. He actively participated in the litigation, albeit obstructively, for two years before judgment was entered against him. A party who deliberately precludes resolution of factual issues through normal adjudicative procedures may be bound, in subsequent, related proceedings involving the same parties and issues, by a prior judicial determination reached without completion of the usual process of adjudication. In such a case the "actual litigation" requirement may be satisfied by substantial participation in an adversary contest in which the party is afforded a reasonable opportunity to defend himself on the merits but chooses not to do so.

Id. at 368 (footnote omitted). The court concluded that application of issue preclusion did not deny Daily his day in court, which he squandered with obstructive behavior, and served the doctrine's "central purposes of 'protecting [the FDIC] from the expense and vexation attending multiple lawsuits, conserving judicial resources, and fostering reliance on judicial

action by minimizing the possibility of inconsistent decisions.'" *Id.* at 369 (quoting *Montana v. United States,* 440 U.S. 147, 153-54, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979)).

Two other circuits have followed *In re Daily. See Bush v. Balfour Beatty Bahamas, Ltd. (In re Bush),* 62 F.3d 1319, 1323-25 (11th Cir.1995); *Wolstein v. Docteroff (In re Docteroff),* 133 F.3d 210, 215-16 (3d Cir.1997). We agree with the holdings in these cases. Mr. Corey attempts to distinguish them on the ground that the Virginia court did not enter a default judgment as a sanction against him, but merely precluded him from raising a defense. Why that matters, however, is a mystery to us. The essential point is that the only reason that the first court did not have to assess the merits of the issue before deciding it is that the losing party's misconduct forfeited its right to such an assessment. The policies underlying issue preclusion are best served by precluding Mr. Corey from contesting in this adversary proceeding that he committed fraud.

We DENY Melnor's motion to take judicial notice of the pleadings in the Virginia lawsuit because such notice is unnecessary to our resolution of the case.

II. CONCLUSION

The BAP's judgment is AFFIRMED.

394 B.R. 519

United States Bankruptcy Appellate Panel
of the Tenth Circuit.

In re Christopher F. COREY, Debtor.
Melnor, Inc., Plaintiff-Appellee,
v.
Christopher F. Corey, Defendant-Appellant.
BAP No. KS-07-115.
Bankruptcy No. 07-20462.
Adversary No. 07-06118.

Oct. 6, 2008.

Jeffrey R. Siegel of The Siegel Law Firm, Kansas City, MO, for Defendant-Appellant.

Colin N. Gotham of Evans & Mullinix, P.A., Shawnee, KS, for Plaintiff-Appellee.

Before THURMAN, RASURE, and ROMERO[1], Bankruptcy Judges.

OPINION

RASURE, Bankruptcy Judge.

I. INTRODUCTION

Appellant Christopher F. Corey, the debtor and defendant below ("Corey"), appeals a judgment

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[1] Honorable Michael E. Romero, United States Bankruptcy Judge, United States Bankruptcy Court for the District of Colorado, sitting by designation.

finding Appellee Melnor, Inc.'s ("Melnor") claim against him to be non-dischargeable pursuant to 11 U.S.C. § 523(a)(2)(A) (the "Section 523(a)(2) Judgment").[2] The bankruptcy court granted summary judgment on Melnor's Section 523(a)(2)(A) claim because it concluded, as a matter of law, that a prior judgment Melnor had obtained against Corey in litigation before a federal district court in Virginia (the "Virginia Judgment") had already determined that the debt Melnor sought to except from discharge was procured by fraud, and therefore the issue of Corey's fraud was not subject to further litigation in Melnor's adversary proceeding.

Corey argued below, and argues on appeal, that the Virginia Judgment should not have preclusive effect because it was a "default" judgment, and under federal preclusion law, issues determined in default judgments are not considered to have been "actually litigated," thus negating an element required for issue preclusion. However, the bankruptcy court found that the Virginia Judgment had been entered in default as a sanction for Corey's obstreperous litigation tactics, rather than for simply failing to appear or defend Melnor's claims. Accordingly, the bankruptcy court concluded that Corey had a full and fair opportunity to litigate the issue of fraud, that Corey's own conduct prevented the issue of fraud

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[2] Corey appeals the portion of the Section 523(a)(2) Judgment that excepts Melnor's debt from discharge. Neither party has appealed the denial of Melnor's Section 727(a)(4)(A) claim.

from being "actually litigated" to its conclusion, and accordingly, that the Virginia Judgment precluded Corey from contesting whether his debt to Melnor was procured by fraud.

The bankruptcy court's memorandum opinion is well reasoned and is supported by the uncontested material facts and by preclusion law established in the Tenth Circuit.[3] Accordingly, the Section 523(a)(2) Judgment is AFFIRMED.

II. APPELLATE JURISDICTION

This Court has jurisdiction to hear timely-filed appeals from "final judgments, orders, and decrees" of bankruptcy courts within the Tenth Circuit unless one of the parties elects to have the district court hear the appeal.[4] Neither party elected to have this appeal heard by the United States District Court for the District of Kansas. The parties have therefore consented to appellate review by this Court.

A decision is considered final "if it 'ends the litigation on the merits and leaves nothing for the

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[3] *See McCart v. Jordana (In re Jordana)*, 232 B.R. 469 (10th Cir. BAP 1999), *aff'd*, No. 99-6194, 2000 WL 783401 (10th Cir. June 20, 2000).

[4] 28 U.S.C. § 158(a)(1), (b)(1), and (c)(1); Fed. R. Bankr.P. 8001; 10th Cir. BAP L.R. 8001-1.

court to do but execute the judgment.'"[5] As the bankruptcy court granted summary judgment in favor of Melnor on its Section 523(a)(2) claim and granted summary judgment in favor of Corey on Melnor's Section 727 claim, thus disposing of all Melnor's claims against Corey, and no post-judgment motions are pending, the judgment of the bankruptcy court is final for purposes of review.

III. ISSUE APPEALED

The issue on appeal is whether the bankruptcy court erred in concluding that the Virginia Judgment (a federal court judgment), which established Corey's liability for fraud (and the amount of damages), and which was entered by default after Corey failed to appear at a discovery hearing and at trial, should preclude Corey from defending on the merits Melnor's claim to except the debt represented by the Virginia Judgment from discharge under Section 523(a)(2).

IV. STANDARD OF REVIEW

A bankruptcy court's grant of summary judgment based on a finding that the elements of issue preclusion (sometimes referred to herein as collateral estoppel) were satisfied is reviewed *de novo,* and the Court must use the same standard, Rule 56 of the

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[5] *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712, 116 S.Ct. 1712, 135 L.Ed.2d 1 (1996) (quoting *Catlin v. United States*, 324 U.S. 229, 233, 65 S.Ct. 631, 89 L.Ed. 911 (1945)).

Federal Rules of Civil Procedure, that the bankruptcy court was required to apply. *See Gonzales v. Hernandez,* 175 F.3d 1202, 1204 (10th Cir.1999). Accordingly, this Court must review the record presented to the bankruptcy court on summary judgment in the light most favorable to, and draw inferences from the record in favor of, the party that did not move for summary judgment, which in this case is Corey. *See id.; Fischer v. Forestwood Co.,* 525 F.3d 972, 978 (10th Cir.2008). No deference to the bankruptcy court's determination is permitted in a *de novo* review. *See Salve Regina Coll. v. Russell,* 499 U.S. 225, 238, 111 S.Ct. 1217, 113 L.Ed.2d 190 (1991).[6]

If, on its *de novo* review, this Court finds that the elements of issue preclusion were established by the evidentiary record on summary judgment, it must then review the bankruptcy court's decision to invoke

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[6] In considering the summary judgment pleadings *de novo,* it appears that the documents attached to parties' motions and briefs were not authenticated by an affidavit or otherwise, and therefore do not comply with Rule 56(e) of the Federal Rules of Civil Procedure (applicable to the adversary proceeding by virtue of Rule 7056 of the Federal Rules of Bankruptcy Procedure). *See Harris v. Beneficial Okla., Inc. (In re Harris),* 209 B.R. 990, 993-94 (10th Cir. BAP 1997) ("[I]f a party wishes to have its documents considered by the court, they must be admissible as evidence. In order to be admissible as evidence, a supporting affidavit must accompany the documents" (quotations and citation omitted). However), neither party objected below to the authenticity of the documents attached to the parties' motions and briefs, and therefore any evidentiary objections to consideration of the documents have been waived.

the doctrine to preclude Corey from defending Melnor's fraud claim for an abuse of discretion. *See Arapahoe County Pub. Airport Auth. v. FAA,* 242 F.3d 1213, 1220 (10th Cir.2001) (trial court has discretion over whether to apply issue preclusion in any particular case). Under the abuse of discretion standard, the bankruptcy court's decision to apply collateral estoppel should be affirmed "unless the appellate court has a definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances." *Moothart v. Bell,* 21 F.3d 1499, 1504 (10th Cir.1994) (internal quotations and citation omitted). "An abuse of discretion occurs when the [lower] court's decision is arbitrary, capricious or whimsical, or results in a manifestly unreasonable judgment." *Id.* at 1504-05 (quotations and citation omitted).

V. UNCONTESTED MATERIAL FACTS BEFORE THE BANKRUPTCY COURT[7]

The record on summary judgment establishes that although Corey resided in either Kansas or Colorado during the pendency of the Virginia litigation, Corey materially participated in the Virginia

[7] In their briefs, the parties' disagreements concerning any of the following material facts were based on the opposing party's characterization or interpretation of documents attached to the briefs, but were not based on conflicting evidence. Certain facts were legitimately controverted, but those facts were not relevant to Melnor's Section 523(a)(2) claim.

proceedings by filing pleadings, conducting discovery, and requesting hearings. Some aspects of Corey's participation in the Virginia litigation can be gleaned from the pleadings attached to the summary judgment briefs. These pleadings reveal the following chronology of events:[8]

On December 17, 2004, Melnor filed a Complaint in the United States District Court for the Western District of Virginia (the "Virginia District Court"), asserting claims against Corey (and SKR Resources, Inc. ("SKR"), a company of which Corey was president) for fraud, unjust enrichment, and constructive fraud. *See* Complaint, attached to Melnor's Motion for Summary Judgment, *in* Appendix ("App.") at 78.[9] On March 28, 2005, a default judgment was entered against Corey for failure to respond to the Complaint. *See* Motion to Set Aside Default at 2, *in* App. at 185. On April 6, 2005, Corey's counsel filed a Motion to Set Aside Default, citing defective service of process on Corey as cause. *Id.* at 184-87. Although not contained in the record, the Motion to Set Aside Default must have been granted, because litigation against Corey continued.

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[8] The docket sheet for the Virginia litigation was not part of the appellate record.

[9] All documents referred to herein were attached as exhibits to the summary judgment briefs below and are properly in the record on summary judgment.

Melnor propounded discovery requests on Corey and filed a motion to compel discovery. On August 18, 2005, Corey's counsel filed a motion to dismiss for lack of jurisdiction (the "Motion to Dismiss"), contending that Corey did not have sufficient ties to the state of Virginia for the Virginia District Court to assume jurisdiction over his person. App. at 84-92. On August 31, 2005, Corey's counsel filed an opposition to Melnor's motion to compel, asserting that Melnor's discovery requests were premature because Corey's Motion to Dismiss was pending. App. at 196-207.

On September 15, 2005, Corey, as president of co-defendant SKR, advised Stephanie Lewis, who was then counsel for both SKR and Corey, by letter that SKR had "elected to terminate your service" in the Virginia litigation. App. at 209. Several months later, on November 20, 2005, Ms. Lewis filed a motion to withdraw as counsel for Corey, representing that she had not been authorized to represent Corey individually in the litigation except to challenge the district court's jurisdiction, which challenge failed when the Motion to Dismiss was denied on November 11, 2005. App. at 155-58. The district court entered an order granting the motion to withdraw. App. at 159. On November 21, 2005, default judgment was entered

against SKR.[10] From that point forward, Corey represented himself.

On December 12, 2005, Corey filed a detailed Answer to the Complaint. App. at 94-96. Thereafter, the parties engaged in additional discovery. At some point, Corey filed answers to Melnor's requests for production of documents in which Corey objected to the majority of Melnor's requests on trade secrets grounds. App. at 233-34. On December 27, 2005, Corey issued to Melnor his requests for production of documents. App. at 236-38. On or about January 3, 2005, Corey responded to Melnor's interrogatories. App. at 239-42. On January 31, 2006, Melnor's counsel took Corey's deposition. App. at 180. Apparently, Melnor objected to Corey's discovery requests, and on February 11, 2006, Corey filed a Motion to Compel Production of Documents from Plaintiff Melnor, Inc. ("Corey's Motion to Compel"). App. at 243-47.

On February 17, 2006, Corey filed a witness list naming ten witnesses and setting forth the anticipated substance of their testimony. App. at 248. On March 28, 2006, a hearing was held on Corey's Motion to Compel, at which Corey failed to appear. The magistrate judge before whom the hearing was to be held recommended that the district court strike Corey's defenses as a sanction. App. at 98. On April 7,

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[10] A final judgment against SKR, which included attorney fees, was not entered until April 5, 2006. App. at 213. That judgment is not relevant to this appeal.

2006, Corey filed a motion for reconsideration, contending that he did not receive notice of the hearing held on March 28, 2006. App. at 250-51.

On May 4, 2006, the district court judge, treating Corey's motion for reconsideration as an objection to the magistrate's report and recommendation, overruled the objection, and adopted the magistrate judge's report and its recommendation to strike Corey's defenses as a sanction for failing to appear at the hearing on Corey's Motion to Compel. App. at 98-99. The district court noted, however, that "this sanction is not simply a response to Corey's failure to appear at a single hearing but rather, is the culmination of a course of obstructive behavior on the part of defendants which has effectively prevented the court from proceeding to the merits of the underlying dispute." *Id.* at 98. Further, the court found that –

> the record reflects a pattern of behavior on the part of the defendants seemingly aimed at preventing the court from ever reaching the merits of that claim. . . . Corey has obstructed the course of discovery by preventing the court from setting and completing essential hearings and by attempting to excuse his behavior by incredibly asserting that he has not received the court's notices. The court finds that striking Corey's defenses and moving forward to the issue of damages is the only way the court can advance this case toward its ultimate resolution. The court is satisfied that any lesser

> sanction would only enable further delays by Corey.

Id. at 98-99. Corey filed a Request for Jury Trial. App. at 235.

On May 23, 2006, pursuant to the order in which the district court found that "moving forward to the issue of damages is the only way the court can advance this case toward its ultimate resolution," the district court assembled a jury (as requested by Corey) for trial on Melnor's damages. Memorandum Opinion of the Virginia District Court at 1, *in* App. at 103. Without notice to Melnor or the district court, Corey failed to appear for trial. *Id.* However, Melnor was present at trial through its counsel and its president. *Id.* The court excused the jury and declared Corey to be in default. *Id.* Melnor presented testimony of its witness and documentary evidence of its damages. *Id.* at 103-04.

On May 24, 2006, the district court issued its Memorandum Opinion summarizing the course of proceedings, in relevant part, as follows:

> [B]y order entered May 4, 2006, the court struck Corey's defenses as a sanction for his course of obstructive behavior. The court was set to proceed to trial on the sole issue of damages on May 23, 2006, and per Corey's request, the court assembled a jury. However, Corey did not appear, the court declared Corey to be in default. The court excused the jury and heard testimony [regarding damages].

Id. The district court concluded that "by virtue of Corey's default, Melnor has succeeded in their [sic] fraud action." *Id.* at 104. The district court further awarded attorney fees to Melnor on the ground that under Virginia law, "reasonable attorney fees [may be awarded] to a successful plaintiff in a fraud action." *Id.* The district court entered a Judgment Order against Corey in the amount of $428,624.07, plus pre-judgment interest from March 14, 2004, and attorney fees in the amount of $94,357.84 (the "Virginia Judgment"). App. at 110.

On March 8, 2007, Corey filed for relief under Chapter 7 of the Bankruptcy Code. On May 23, 2007, Melnor filed its Complaint Objecting to Discharge or to Determine Dischargeability of Debt, to which it attached as conclusive proof that the debt was procured by fraud: (1) the Complaint filed in the Virginia litigation; (2) the Virginia Judgment; and (3) the Memorandum Opinion dated May 24, 2006. App. at 19-36.

VI. CONTENTIONS OF THE PARTIES

Corey contends that the bankruptcy court erred in according offensive preclusive effect to the Virginia Judgment, thereby preventing Corey from defending on the merits whether the debt arose from fraudulent conduct. Corey argues that federal courts do not accord preclusive effect to issues resolved in default judgments because such issues were not "actually litigated" prior to the entry of judgment. Because the

Virginia District Court entered judgment after finding Corey "in default" for failing to appear at a jury trial, Corey contends that the Virginia Judgment is simply a default judgment for failure to defend, and that such a judgment has no preclusive effect.

Melnor contends that Corey had the opportunity to, and did, "actually litigate" the issue of fraud, but chose not to appear at trial to litigate the matter to its conclusion. Melnor argues that the Virginia Judgment was entered as a sanction for frustrating the progress of the litigation, and that issues resolved by judgments entered as sanctions may be given preclusive effect.

VII. DISCUSSION

A prior judgment on a fraud claim may preclude relitigation of the issue of fraud in a proceeding seeking to except the judgment from discharge under Section 523(a)(2). *See Grogan v. Garner,* 498 U.S. 279, 284-85, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991). Federal courts apply federal law in determining the preclusive effect of a judgment entered by a federal court. *See McCart v. Jordana (In re Jordana),* 232 B.R. 469, 475 (10th Cir. BAP 1999), *aff'd,* No. 99-6194, 2000 WL 783401 (10th Cir. June 20, 2000). A federal judgment may establish (or, in other words, preclude relitigation of) an issue in a later proceeding if –

> (1) the issue previously decided is identical with the one presented in the action in

> question, (2) the prior action has been finally adjudicated on the merits, (3) the party against whom the doctrine is invoked was a party or in privity with a party to the prior adjudication, and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action.

Id. at 475-76 (*quoting Frandsen v. Westinghouse Corp.*, 46 F.3d 975, 978 (10th Cir.1995)). In this case, the scope and interpretation of the second and fourth elements of this doctrine are at issue.

Corey is correct in arguing that, in general, default judgments entered by federal courts are not given collateral estoppel effect (although they are given *res judicata,* or claim preclusive, effect) because issues of fact and law were not "actually litigated" to a final adjudication on the merits. In *Arizona v. California,* 530 U.S. 392, 120 S.Ct. 2304, 147 L.Ed.2d 374 (2000), the United States Supreme Court, in distinguishing claim preclusion from issue preclusion, recognized that a *consent judgment* precluded further litigation on the particular claim that was resolved by the consent judgment, but did not preclude later relitigation of issues of fact or law that supported the claim. *Id.* at 414, 120 S.Ct. 2304. About issue preclusion, the Supreme Court stated –

> It is the general rule that issue preclusion attaches only "[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination

> is essential to the judgment." Restatement (Second) of Judgments § 27, p. 250 (1982). "In the case of a judgment entered by confession, consent, or default, none of the issues is actually litigated. Therefore, the rule of this Section [describing issue preclusion's domain] does not apply with respect to any issue in a subsequent action." *Id.*, comment *e*, at 257.

Id. Thus, unless circumstances justifying an exception from the requirement are present, federal law does in fact require an issue to have been "actually litigated" – that is, the issue must have been finally determined by a tribunal after all evidence and argument concerning the issue was fully presented by both parties – before issue preclusion attaches.

Corey argues that because the Virginia District Court declared Corey to be "in default" when he failed to appear at trial, the Virginia Judgment is a "default judgment" in which the issue of fraud was not "actually litigated" by either party, and therefore none of the issues resolved by the Virginia Judgment are conclusive in Melnor's Section 523(a)(2) proceeding. Corey argues that the Tenth Circuit and other circuit courts, as well as the bankruptcy court in this case, erroneously substitute the "full and fair opportunity to litigate" element for the "actually litigated" requirement. Appellant's Brief at 10.[11]

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[11] Corey relies on an opinion of a district court in the Eastern District of Virginia to challenge the propriety of recognizing

(Continued on following page)

This Court agrees with Corey that federal law, as stated by the United States Supreme Court, generally includes the requirement that an issue must have been "actually litigated" to its conclusion in the first case in order to be preclusive in subsequent litigation. However, the "full and fair opportunity to litigate" requirement is not applied in lieu of the "actually litigated" element in the Tenth Circuit, as Corey suggests, but is in fact a separate requirement. Inclusion of "full and fair opportunity to litigate" as an element of issue preclusion is the settled law of the Tenth Circuit,[12] and is not inconsistent with the requirement that the issue resolved be "actually litigated." The requirement that a litigant had a "full and fair opportunity to litigate" an issue in an earlier proceeding is in fact an additional safeguard against unfairly precluding relitigation where the opposing party "conceal[ed] other information that would materially affect the outcome of the case," the party against whom preclusion was sought was "laboring under a mental or physical disability that impeded effective litigation," or "the amount in controversy in

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"full and fair opportunity to litigate" as an element of issue preclusion. Appellant's Brief at 11-12 (citing *Fed. Ins. Co. v. Gilson (In re Gilson),* 250 B.R. 226 (Bankr.E.D.Va.2000)). The reasoning in the *Gilson* case is not binding on this Court, and is contrary to this Court's *Jordana* opinion, which was affirmed by the Tenth Circuit, and therefore is not even persuasive.

[12] *See, e.g., B-S Steel of Kan., Inc. v. Tex. Indus., Inc.,* 439 F.3d 653, 662 (10th Cir.2006); *In re True,* 390 F.3d 1210, 1232 (10th Cir.2004); *Murdock v. Ute Indian Tribe of Uintah and Ouray Reservation,* 975 F.2d 683, 687 (10th Cir.1992).

the first action [was] so small in relation to the amount in controversy in the second that preclusion would be plainly unfair." *Restatement (Second) of Judgments* § 28(5) and cmt. j.

The Tenth Circuit, and several other circuits, however, recognize an *exception* to the "actually litigated" requirement when the party sought to be precluded actually participated in the prior litigation *and* had a full and fair opportunity to litigate, but the issue was resolved by default as a sanction on account of that party's obstructive behavior. Because the party's own sanctionable conduct prevented the issue from being "actually litigated" to judgment, these circuit courts find it inequitable to reward that conduct by giving the errant party a second opportunity to litigate the same issue in a different forum.

In an unpublished order, the Tenth Circuit affirmed and essentially adopted the Bankruptcy Appellate Panel's opinion in the *Jordana* case. *See McCart v. Jordana (In re Jordana),* No. 99-6194, 2000 WL 783401 (10th Cir. June 20, 2000). Therein, the Tenth Circuit stated –

> The bankruptcy court recognized the general rule that a default judgment will not be granted preclusive effect because none of the issues was actually litigated. [Citation omitted]. However, as both the bankruptcy court and the BAP recognized, there is an exception where the losing party has had a full and fair opportunity to participate in the previous litigation, but has engaged in

> serious obstructive conduct resulting in a default judgment. *See Wolstein v. Docteroff (In re Docteroff),* 133 F.3d 210, 216-17 (3d Cir.1997) (affirming the use of collateral estoppel in bankruptcy discharge proceeding where default entered because debtor willfully obstructed discovery); *Bush v. Balfour Beatty [Bahamas], Ltd. (In re Bush),* 62 F.3d 1319, 1323-24 (11th Cir.1995) (same; debtor engaged in dilatory and deliberately obstructive conduct); *FDIC v. Daily (In re Daily),* 47 F.3d 365, 368-69 (9th Cir.1995) (same; debtor deliberately precluded resolution of factual issues by obstructing discovery process). In these circumstances, the "actual litigation" requirement of collateral estoppel may be satisfied because the party was afforded a reasonable opportunity to defend himself on the merits but [chose] not to do so. *See Bush,* 62 F.3d at 1324.

Id. at *1.

The record on summary judgment below supports the bankruptcy court's conclusion that Corey had a full and fair opportunity to defend himself in the Virginia litigation, and that he did participate in the litigation, as set forth in the chronology of undisputed events set forth above, for over a year. Early in the litigation, Corey, through counsel, successfully obtained the vacation of a default judgment entered under Rule 55 for failure to respond to the complaint. Corey, through counsel, unsuccessfully challenged the Virginia court's jurisdiction over his person. After losing his bid to dismiss the case, Corey dismissed his

counsel and chose to proceed *pro se*. Acting *pro se*, Corey answered the Complaint, propounded discovery, responded to discovery, filed a motion to compel discovery, filed a motion to reconsider, and requested that his trial be held before a jury.

Corey argues that the district court did not declare him in "default" as a sanction, but simply because he failed to appear at the jury trial. Although in the May 4, 2006 order, the district court stated that it struck Corey's "defenses" as a sanction, and did not explicitly strike his entire answer (which, in addition to affirmative defenses, included denials of Melnor's allegations), it is clear from the context of the order that the district court intended that the sanction would conclusively establish Corey's liability on the Complaint.[13] The district court explicitly found that "Corey has obstructed the course of discovery by preventing the court from setting and completing essential hearings and by attempting to excuse his behavior by incredibly asserting that he has not received the court's notices. The court finds that

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[13] Melnor argues, persuasively, that in "striking Corey's defenses," the district court explicitly struck all manner of defenses, including denials of Melnor's allegations as well as affirmative defenses. Appellee's Brief at 17. This interpretation is supported by Rules 8 and 10 of the Federal Rules of Civil Procedure. Rule 8(b) is captioned "Defenses: Admissions and Denials" and Rule 8(c) is titled "Affirmative Defenses." Rule 10(b) provides that "each defense other than a denial" must be set out in a separate count or defense. Thus, under the Federal Rules, the term "defenses" includes both denials and affirmative defenses.

striking Corey's defenses and *moving forward to the issue of damages* is the only way the court can advance this case toward its ultimate resolution. The court is satisfied that any lesser sanction would only enable further delays by Corey." App. at 99 (emphasis added). It is impossible to interpret the district court's order as anything less than a declaration of Corey's liability on the Complaint as a sanction for obstructing the course of discovery.

When Corey failed to appear at his jury trial on damages without notice, the district court declared Corey to be in default. Declaring a litigant in default due to an unexcused non-appearance at trial at which a jury has been assembled is not equivalent to a Rule 55 default for failure to answer and defend, as Corey contends. The district court justifiably entered default in light of the inconvenience and unnecessary expense appearing for an uncontested trial caused Melnor, its counsel, its witnesses, the court and the jury. In this case, entering default at the trial on damages was a further sanction for obstructing the progress of the proceedings.

Corey contends that even though the district court concluded that his conduct was consistently obstructive, the district court never "inquired into Mr. Corey's intent, or the reasons for his litigation problems," which would have elicited from Corey that for financial reasons, he was unable to hire counsel and travel to Virginia to attend hearings. Appellant's Brief at 14. If Corey believed that the Virginia District Court erroneously concluded that his litigation

strategy was sanctionable, he should have sought relief under Rule 59 or 60 of the Federal Rules of Civil Procedure, or appealed the Virginia Judgment. He may not collaterally attack the sanction as unjustified or against the weight of the evidence in the Section 523(a)(2) proceeding.

Corey also argues that the *bankruptcy court* should have taken into consideration his dire financial straits and the fact that he was forced to defend himself *pro se,* from which the court could have concluded that issue preclusion was inequitable in this case. Appellant's Brief at 17. Because these circumstances effectively relieved Melnor from the obligation to produce evidence of fraud to the court or jury in the Virginia litigation, Corey contends that the bankruptcy court should have required the elements of Melnor's fraud claim be established in the Section 523(a)(2) proceeding. Accordingly, Corey asserts that the bankruptcy court abused its discretion in applying issue preclusion in this case.

In balancing the equities, however, even if Corey was financially ill-equipped and lacked the legal sophistication to properly defend himself in the Virginia litigation, Corey did cause Melnor to incur almost $95,000 in fees and expenses in order to actively litigate its claim in the Virginia litigation before Corey gave up his defense. It would be manifestly unfair to Melnor to require it to litigate its fraud claim anew, simply because Corey decided that he was not satisfied with the course of the Virginia litigation and opted out at the last moment, leading

the district court to enter a judgment in his absence.[14] The bankruptcy court's decision to bar Corey from causing Melnor to expend even more time and resources pursuing a claim that had already been actively litigated and reduced to judgment once was not outside the realm of permissible outcomes or a clear error of judgment, nor was it arbitrary or capricious.

In summary, even taking the evidence proffered on summary judgment in the light most charitable to Corey, it is undisputed that the Virginia District Court found Corey's litigation tactics, including his failure to appear at trial, seriously obstructive, resulting in the entry of the Virginia Judgment adverse to Corey. The record establishes that Corey had a full and fair opportunity to defend himself against Melnor's claims, and did so for over a year, but unilaterally chose to cease litigating without notice to the court or Melnor.[15] The district court found that

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[14] Corey asserts that since Melnor never had to put on its proof in the Virginia litigation, it would not be "prejudiced by having to prove fraud for the *first* time" in the Section 523(a)(2) proceeding. Appellant's Brief at 17 (emphasis in original). Events underlying Melnor's fraud claim occurred in 2003, however, and the Virginia District Court found that Corey had not fully cooperated in discovery in the Virginia litigation, and therefore discovery had not been completed. The record does not reflect an absence of prejudice to Melnor if Melnor were required to reinstate the fraud litigation at this late date.

[15] If Corey and Melnor had entered into a consent judgment, for instance, or a settlement, there would not have been a binding finding of fraud unless the parties agreed that preclusion

(Continued on following page)

Corey engaged in "a course of obstructive behavior . . . which . . . effectively prevented the court from proceeding to the merits of the underlying dispute," declared Corey's liability on the Complaint as a sanction, and moved on to hearing evidence of damages. The district court further awarded Melnor almost $95,000 in fees, concluding that such an amount was reasonable "in light of the complexity and duration of the case and the unnecessarily protracted course of litigation Corey's actions have yielded." Memorandum Opinion at 3, App. at 105. The district court concluded that "by virtue of Corey's default, Melnor has succeeded in their [sic] fraud action" and fees were awarded pursuant to Virginia law permitting fee shifting to a successful plaintiff in a fraud action. *Id.* at 104.

The bankruptcy court did not err in concluding that the issues of fraud and damages were conclusively established by the Virginia Judgment, and did not abuse its discretion in concluding that, notwithstanding that the Virginia litigation was not actively defended by Corey to its conclusion, the exception to "actually litigated" element of collateral estoppel, recognized in the *Jordana, Docteroff, Bush*, and *Daily* cases, was applicable, and, accordingly, that the Virginia Judgment precluded relitigation of the issues

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was intended. *See United States v. Botefuhr,* 309 F.3d 1263, 1282 (10th Cir.2002) (citing *Restatement (Second) of Judgment* § 27, cmt. e).

of fraud and damages in the Section 523(a)(2) proceeding.

VIII. CONCLUSION

The Judgment Granting Complaint Pursuant to § 523(a)(2)(A) to Except Melnor's Claim From Discharge and Denying Complaint Objecting to Discharge Pursuant to § 727(a)(4)(A) is AFFIRMED.

2007 WL 4563432

United States Bankruptcy Court,
D. Kansas.
In re Christopher F. COREY, Debtor.
Melnor, Inc., Plaintiff,
v.
Christopher F. Corey, Defendant.
Bankruptcy No. 07-20462.
Adversary No. 07-6118.

Dec. 21, 2007.

Colin N. Gotham, Evans & Mullinix, P.A., Shawnee, KS, for Plaintiff.

Jeffrey R. Siegel, The Siegel Law Firm, Kansas City, MO, for Defendant.

MEMORANDUM OPINION AND ORDER ON DEFENDANT'S MOTION TO DISMISS, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, AND DEFENDANT'S CROSS MOTION FOR SUMMARY JUDGMENT

DALE L. SOMERS, United States Bankruptcy Judge.

Plaintiff Melnor, Inc. filed this adversary proceeding praying for denial of discharge pursuant to 11 U.S.C. § 727(a)(4)(A) and objecting to discharge of its claim against Debtor pursuant to 11 U.S.C. § 523(a)(2)(A).[1] The matters under advisement are:

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[1] This Court has jurisdiction over the parties and the subject matter pursuant to 28 U.S.C. §§ 157(a) and 1334(a) and (b),
(Continued on following page)

Defendant's Motion to Dismiss Complaint;[2] Plaintiff's Motion for Summary Judgment;[3] and Defendant's Cross Motion for Summary Judgment.[4] Plaintiff Melnor, Inc. (hereafter "Melnor") appears by Colin N. Gotham, of Evans & Mullinix, P.A. Defendant Christopher F. Corey (hereafter "Corey" or "Debtor") appears by Jeffrey R. Siegel, of The Siegel Law Firm. There are no other appearances.

POSITIONS OF THE PARTIES.

Melnor's Complaint alleges that its claim for payment of a judgment entered in its favor against Debtor in the United States District Court for the District of Virginia is nondischargeable as a matter of law under § 523(a)(2)(A) because the judgment was based upon fraud and is binding upon the Debtor in

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and the Standing Order of the United States District Court for the District of Kansas that exercised authority conferred by § 157(a) to refer to the District's bankruptcy judges all matters under the Bankruptcy Code and all proceedings arising under the Code or arising in or related to a case under the Code, effective July 10, 1984. Furthermore, this Court may hear and finally adjudicate this matter because it is a core proceeding pursuant to 28 U.S.C. §§ 157(b)(2)(I) and (J). There is no objection to venue or jurisdiction over the parties.

[2] Doc. 12. The Motion to Dismiss is actually a motion for partial dismissal, as it addresses only the § 523(a)(2)(A) exception from discharge claim.

[3] Doc. 17. This pleading also includes a motion to amend the Complaint, in the event the Court does not grant summary judgment.

[4] Doc. 19.

dischargeability litigation under the doctrine of collateral estoppel. As to the § 727(a)(4)(A) denial of discharge claim, Melnor relies upon an alleged false statement in Debtor's Schedule F.

Debtor moves to dismiss the § 523 count of the Complaint arguing the Virginia judgment has no collateral estoppel effect because the issue of fraud was not actually litigated. Melnor responds that the judgment does have collateral estoppel effect, even though the allegations of fraud were not litigated, because the judgment is based upon default entered as a result of Debtor's litigation misconduct.

Melnor moves for summary judgment on its § 523(a)(2)(A) claim based on the same arguments as presented in opposition to Debtor's motion to dismiss. As to the § 727(a)(4)(A) allegation, Melnor relies exclusively upon alleged mischaracterization of its judgment on Debtor's Schedule F as a liability on a "business loan cosigned." Debtor opposes summary judgment on both counts and moves for summary judgment. Plaintiff moves to amend its Complaint, if the Court denies summary judgment on both counts.[5]

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[5] The proposed amended complaint is in three counts: Court [sic] I – that Melnor's claim is not dischargeable based upon factual allegations of fraud; Court [sic] II – that Melnor's claim is not dischargeable based upon collateral estoppel effect of Virginia Judgment; and Count III – objection to discharge based upon alleged mischaracterization of Virginia Judgment on Schedule F.

The Court will first address the § 523(a)(2)(A) dischargeability claim and then separately address the objection to discharge under § 727(a)(4)(A).

I. THE § 523(a)(2)(A) DISCHARGEABILITY CLAIM.

A. FINDINGS OF FACT RELEVANT TO THE § 523(a)(2)(A) CLAIM OF NONDISCHARGEABILITY OF THE VIRGINIA JUDGMENT.

The facts concerning the Virginia Judgment are uncontroverted. Although the Court has not been provided a docket sheet or the complete record of the Virginia litigation, the following facts relating to the Virginia litigation of Melnor against Corey are evidenced by the document copies provided and the uncontroverted statements in the pleadings.

On December 17, 2004, Melnor filed a complaint in the United States District Court for the Western District of Virginia against Corey and SKR Resources, Inc. The complaint alleged causes of action against both defendants for fraud, unjust enrichment, and constructive fraud arising out of a barter agreement between Melnor and SKR, whereby SKR agreed to deliver goods valued at $435,000 to Melnor in exchange for trade credits, in the form of airline travel, hotel accommodations and media advertising. Corey, the president and an employee of SKR, who signed the contract, was alleged to have made misrepresentations during telephone conversations prior

to the formation of the barter agreement and to be liable for SKR's debt to Melnor as SKR's alter ego. Melnor prayed for compensatory damages of $435,000, punitive damages, and attorneys fees and costs. Default Judgment against Corey was filed on March 28, 2005. On April 6, 2005, Corey, "individually and through counsel," filed a motion to set aside the default.

On August 18, 2005, through counsel, a motion to dismiss the claim against Corey for lack of personal jurisdiction was filed. On August 31, 2005, through counsel, Corey opposed a motion to compel filed by Melnor. That pleading references a supplemental motion requesting a decision regarding lack of jurisdiction over SKR filed on August 26, 2005, a Motion to Dismiss or Change of Venue, and a Motion to Change the Scheduling Order. By letter dated September 15, 2005, SKR, by Christopher Corey, President, informed counsel for SKR and Corey that her services in the Virginia litigation were terminated. Counsel's motion to withdraw was filed on or about November 20, 2005 and was granted on December 9, 2005. Thereafter, Corey appeared pro se.

Motions to dismiss both SKR and Debtor were denied. By order dated November 10, 2005, the court directed the clerk to enter a default judgment against SKR. By memorandum opinion and order dated November 21, 2005, the court entered default judgment

against SKR in the amount of $428,624.01 plus interest.[6]

On December 12, 2005, Corey filed an answer pro se, denying the allegations of the complaint and asserting as affirmative defenses that Melnor engaged in fraud as to the value of the goods and that the complaint failed to state a cause of action for fraud, constructive trust, or unjust enrichment. On March 30, 2006, the magistrate presiding over the Virginia litigation issued a report in part as follows:

> Upon Christopher Corey's proposal of March 28, 2006 as a suitable date to conduct a hearing on outstanding pretrial motions, the undersigned scheduled a hearing on his outstanding motion to compel. On March 10, 2006, a notice of hearing was sent to Christopher Corey via the United States Postal Service and to counsel for the plaintiff by electronic means. Without providing the court, or the opposition counsel with notice that he would not be present at the hearing, Corey simply did not appear at the March 28, 2006 hearing.
>
> Believing the monetary sanctions heretofore endorsed are not adequate, after the finding that Corey's conduct almost blatantly caused

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[6] By order filed on April 5, 2006, the judgment against SKR was increased to include prejudgment interest and attorney fees of $43,558.13. SKR filed for relief under Title 11 on July 20, 2006 in the United States Bankruptcy Court for the District of New Jersey, Case No. 06-16631.

> plaintiff to incur expenses preparing and attending the hearing, and finally noting that there have been prior occasions when matters were set before the court which Corey sought to avoid, it is
>
> RECOMMENDED
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> that the presiding court consider sanctioning Christopher Corey by striking his defenses.

The District court considered the recommendation and on May 4, 2006 ruled as follows:

> This matter is before the court on the Report and Recommendation of United States Magistrate Judge Waugh Crigler, who recommends that the court strike defendant Christopher Corey's defenses as a sanction for Corey's failure to appear at a scheduled hearing and for Corey's overall failure to meaningfully participate in discovery. Neither party has filed objections. Having reviewed the Report and pertinent portions of the record, the court adopts the Report and Recommendation in its entirety and writes separately to note that this sanction is not simply a response to Corey's failure to appear at a single hearing but, rather, is the culmination of a course of obstructive behavior on the part of the defendants which has effectively prevented the court from proceeding to the merits of the underlying dispute.
>
> Melnor essentially claims that SKR and Corey accepted over $400,000 in merchandise in

> exchange for services they never intended to provide. However, the record reflects a pattern of behavior on the part of the defendants seemingly aimed at preventing the court from ever reaching the merits of that claim. Federal Rule of Civil Procedure 37(b) authorizes the court to strike a party's defenses should he fail to cooperate in discovery. The record shows that Corey has obstructed the course of discovery by preventing the court from setting and completing essential hearings and by attempting to excuse his behavior by incredibly asserting that he has not received the court's notices. The court finds that striking Corey's defenses and moving forward to the issue of damages is the only way the court can advance this case toward its ultimate resolution. The court is satisfied that any lesser sanction would only enable further delays by Corey. Accordingly, the court ADOPTS Judge Crigler's Report and Recommendation in its entirety and hereby STRIKES Corey's defenses.

On May 23, 2006, after the May 4th order had "struck Corey's defenses as a sanction for his course of obstructive behavior," the district court was prepared to proceed to trial on the sole issue of damages. Pursuant to Corey's request, the court assembled a jury. Corey did not appear, and the court declared Corey in default. The court then proceeded to hear evidence on damages and held Melnor entitled to compensatory damages of $428,624.07, with interest

at the rate of 6% from March 14, 2004 to the date of judgment, and $94,357.84 in attorney fees, as reasonable attorney fees to a successful plaintiff in a fraud action. These findings were memorialized in a Memorandum Opinion filed on May 24, 2006, which started with the sentence, "Plaintiff Melnor, Inc., brings this diversity action against SKR Resources, Inc. (SKR) and Christopher Corey for fraud." A Judgment Order (hereafter the "Virginia Judgment") was filed on the same date. On July 17, 2006, Melnor filed the Virginia Judgment in the District Court of Johnson County.

On March 8, 2007, Corey filed for relief under Chapter 7.

B. ANALYSIS AND CONCLUSIONS OF LAW ON THE § 523(A)(2)(A) CLAIM OF NONDISCHARGEABILITY OF THE VIRGINIA JUDGMENT.

Subsection 523(a)(2)(A), on which Melnor relies when asserting that its claim for payment of the Virginia Judgment is nondischargeable, provides:

> (a) A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt –
>
> * * *
>
> (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by –

> (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;

The subsection has been construed to permit fraud claims that creditors have successfully reduced to judgment to be excepted from discharge.[7] The amount excepted may include attorney fees and costs, in addition to compensatory damages.[8] Once a plaintiff establishes that money or property was obtained by fraud, any debt arising from the fraud is excepted from discharge, regardless of whether the debtor obtained any benefit from the fraud.[9]

"[C]ollateral estoppel principles . . . apply in discharge exception proceedings pursuant to § 523(a)."[10] Plaintiff Melnor in its nondischargeability Complaint and when moving for summary judgment alleges that the Virginia Judgment establishes its entitlement to an order of nondischargeability as a matter of law.[11] Debtor, when moving to dismiss the § 523(a)(2)(A)

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[7] *Grogan v. Garner*, 498 U.S. 279, 290 (1991).

[8] *Cohen v. de la Cruz*, 523 U.S. 213, 217-223 (1998).

[9] *E.g., Muegler v. Bening (In re Muegler)*, 413 F.3d 980, 983 (9th Cir.2005).

[10] *Grogan*, 498 U.S. at 284, n. 11.

[11] As stated above, the facts concerning the Virginia Judgment are uncontroverted. Pursuant to Fed. R. Bankr.P. 7056 and LBR 7056, Melnor's summary judgment motion should be granted if there are no material facts in controversy and Melnor is entitled to judgment as a matter of law.

count and when opposing Melnor's motion for summary judgment, contends that the Virginia Judgment is not entitled to collateral estoppel effect because the fraud claim was not actually litigated in the Virginia litigation. Debtor raises no additional issues. Thus, the resolution of the dischargeability count requires the Court to determine a question of law: Whether collateral estoppel as applied to the Virginia Judgment precludes Debtor's litigation of his liability to Melnor for fraud and the amount of Melnor's fraud claim.[12]

The doctrine of collateral estoppel bars the relitigation of issues that have been tried in a prior lawsuit.[13] It may be used offensively when a plaintiff seeks to foreclose the defendant from litigating an issue which the defendant unsuccessfully litigated in a prior action.[14] Federal principles of collateral estoppel apply to prior judgments that were rendered by a federal court.[15] Generally, in the Tenth Circuit,

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[12] The Memorandum and Order expressly finds that Melnor brought the diversity action "for fraud." Attorneys fees were awarded under the authority of *Prospect Devel. Co., Inc. v. Bershader,* 258 Va. 75, 92, 515 S.E.2d 291, 301 (Va.1999). That case affirmed a finding of actual fraud and held "in a fraud suit, a chancellor, in the exercise of his discretion, may award attorney fees to a defrauded party."

[13] *Parklane Hosiery Co., Inc. v. Shore,* 439 U.S. 322, 326 (1979).

[14] *Id.,* 439 U.S. at 326, n. 4.

[15] *Murdock v. Ute Indian Tribe,* 975 F.2d 683, 687 (10th Cir.1992)

collateral estoppel bars the relitigation of an issue when:

> (1) the issue previously decided is identical with the one presented in the action in question, (2) the prior action has been finally adjudicated on the merits, (3) the party against whom the doctrine is invoked was a party or in privity with a party to the prior adjudication, and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action.[16]

Corey asserts that the second element is not satisfied in this case because the Virginia Judgment was entered by default without trial.[17] Melnor argues that there is an exception to the judgment on the merits element which applies in this case. That exception, as stated by the Tenth Circuit, allows preclusive effect of a default judgment "where the losing party has had a full and fair opportunity to participate in the previous litigation, but has engaged in serious obstructive conduct resulting in a default judgment."[18] This exception depends upon the facts and circumstances of the previous litigation. Melnor's

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[16] *Id.*

[17] Corey does not challenge the satisfaction of the other elements.

[18] *Trustees of the Colorado Laborers' Health and Welfare Trust Fund v. Sukut (In re Sukut)*, 357 B.R. 840, 845 (Bankr.D.Colo.2006), quoting *In re Jordana*, 2000 WL 783401, *1 (10th Cir.2000) (unpublished disposition).

reliance on the exception to the actual litigated requirement places before this Court the question whether Corey's conduct in the Virginia fraud litigation was sufficiently obstructive for the Virginia Judgment to be binding in this dischargeability litigation.

Case law illustrates the requirement. The Tenth Circuit BAP in *In re Jordana*[19] affirmed summary judgment in favor of creditor McCart on her objection to the discharge of a claim based upon a default judgment entered against debtor in securities fraud litigation. The securities suit had been brought by McCart in federal court against Debtor for fraudulently inducing McCart to buy worthless securities. Debtor initially retained counsel, but counsel withdrew early in the proceedings. Although advised by the court to retain new counsel, debtor refused, "stating God was his counsel."[20] McCart served debtor with an amended complaint, to which he never responded, despite repeated admonishments from the court. Debtor did not respond to discovery requests, despite six letters from adverse counsel. Debtor absconded with the original copy of his deposition and refused to return it. McCart moved for default judgment, and the court issued an order to show cause directing debtor to respond in writing why a default should not be entered. Debtor's response was a letter

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[19] *McCart v. Jordana (In re Jordana)*, 232 B.R. 469 (10th Cir.BAP1999) aff'd 216 F.3d 1087 (table) (10th Cir.2000).

[20] *Id.*, 232 B.R. at 471.

alleging that McCart's lawyer had been lying about him, that McCart had told debtor's family that he should not be a party, and that his family knew that he was completely blameless. The district court entered a default judgment finding that debtor had "assiduously pursued a policy of obfuscation, refusing to cooperate in discovery and refusing to answer the plaintiff's First Amended Complaint, in spite of repeated warnings by both plaintiff's counsel and this Court."[21] The bankruptcy court gave preclusive effect to the prior judgment and granted McCart summary judgment under §§ 523(a)(2)(A) and (B). The BAP affirmed, finding all elements of collateral estoppel present. Although acknowledging the rule that a traditional default judgment, where a defendant is served but fails to appear and plead, is always subject to collateral attack, the BAP found debtor was "twisting the term 'default judgment'" when seeking to come within the rule. The court stated:

> Here the default was entered as a sanction where the debtor was properly served, filed an initial answer and given every opportunity to defend himself. He chose, however, to "assiduously pursue a policy of obfuscation" to frustrate the judicial process. . . . He had every opportunity to litigate the fraud claims against him. This is not a default judgment in the sense of the cases he cites. Allowing

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[21] *Id.*, 232 B.R. at 472.

him to relitigate the District Court judgment would reward his misbehavior.[22]

The BAP's decision was affirmed by the Tenth Circuit in an unpublished opinion.[23]

Several other circuits have sanctioned the use of collateral estoppel to preclude defense of claims of nondischargeability of fraud default judgments entered as a sanction in prior litigation. The Ninth Circuit adopted the exception in *In re Daily*.[24] The FDIC had been granted relief from stay to pursue in the United States District Court for the District of Kansas a RICO claim against debtor, asserting that he had obtained money from Indian Springs State Bank by various fraudulent acts. The FDIC sought discovery from debtor, but nothing was forthcoming. After unsuccessfully pressing its requests for two years, the FDIC moved for sanctions under Federal Rule 37.[25] The district court held a hearing and found:

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[22] *Id.*, 232 B.R. at 476.

[23] *In re Jordana*, 216 F.3d 1087 (table), 2000 WL 783401 (10th Cir.2000).

[24] *FDIC v. Daily (In re Daily)*, 47 F.3d 365 (9th Cir.1995).

[25] Fed.R.Civ.P. 37(d)(2006). It provided in part:

(d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection. If a party . . . fails (1) to appear before the officer who is to take the deposition . . . , or (2) to serve answers or objections to interrogatories submitted under Rule 33 . . . , or (3) to serve a written response to a request for inspection . . . , the court in which the action is pending on

(Continued on following page)

> . . . Daily's failure to provide discovery "was the result of a deliberate, dilatory course of conduct," that Dailey had "chose[n] to delay responses until delay was no longer an option," and that Dailey's "strategy of delay and evasiveness . . . [had] significantly prejudiced the plaintiffs . . . [and had] significantly interfered with the judicial process."[26]

All allegations of the complaint were deemed admitted, and a default judgment was entered for the amount of the prayer. The Tenth Circuit affirmed the judgment.[27] In the bankruptcy court dischargeability

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motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under subparagraphs (A), (B), and (C) of subdivision (b)(2) of this rule. . . .

Fed.R.Civ.P. 37(b)(2)(B) and (C), referred to above, provided:

(2) Sanctions by Court in Which Action is Pending. If a party . . . fails to obey an order to provide or permit discovery . . . , the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

* * *

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

[26] *In re Dailey*, 47 F.3d at 367.

[27] *FDIC v. Dailey*, 973 F.2d 1525 (10th Cir.1992).

litigation, the court held the Kansas court's order and judgment in the RICO case established the element of actual fraud and the facts thereby established were sufficient to preclude discharge of Dailey's debt to the FDIC under § 523(a)(2)(A). The Hawaii District Court affirmed. On appeal, the Ninth Circuit held that the RICO judgment was not an ordinary default judgment. "Daily did not simply decide that burden of litigation outweighed the advantages of opposing the FDIC's claim and fail to appear;"[28] he obstructively participated in the litigation for two years before the default was entered. "A party who deliberately precludes resolution of factual issues through normal adjudicative procedures may be bound, in subsequent, related proceedings involving the same parties and issues, by a prior judicial determination reached without completion of the usual process of adjudication."[29] In these circumstances the actual litigation requirement of collateral estoppel is satisfied by the "substantial participation in an adversary contest in which the party is afforded a reasonable opportunity to defend himself on the merits but chooses not to do so."[30]

The Eleventh Circuit, in *In re Bush,*[31] found *Daily* persuasive.[32] Bush had been sued by Balfour for fraud

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[28] *In re Daily,* 47 F.3d at 368.

[29] *Id.*

[30] *Id.*

[31] *Bush v. Balfour Beatty Bahamas, Limited (In re Bush),* 62 F .3d 1319 (11th Cir.1995).

[32] *Id.*, 62 F.3d at 1325.

in federal district court. He answered, filed a counterclaim, and engaged in discovery for several months. After his counsel was allowed to withdraw because of difficulty in contacting his client, Bush failed to produce exhibits and to appear for a deposition, despite three reminder letters. Bush responded to a motion for sanctions under Rule 37(d), but then failed to appear for a pretrial conference. After hearing argument on the motion for sanctions, the court entered judgment in accord with the complaint. There was no objection to the default and no appeal. After Bush filed bankruptcy, Balfour filed a complaint objecting to discharge of its default judgment. Balfour was granted summary judgment holding that Bush was estopped to deny the fraud alleged in the district court complaint. The district court affirmed the bankruptcy court. On appeal, the Eleventh Circuit distinguished the case from those in which a default judgment is not entitled to collateral estoppel effect, identifying the underlying rationale as not barring "a party [who] may decide that the amount at stake does not justify the expense and vexation of putting up a fight."[33] This was contrasted with the unfairness of giving a debtor/defendant a second bite at the apple when he actively participated in the action for an extended period of time and then engaged in "dilatory and deliberately obstructive conduct," which resulted in a default judgment.[34] The court observed that

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[33] *Id.*, 62 F.3d at 1324, *quoting In re Gottheiner*, 703 F.2d 1136, 1140 (9th Cir.1983).

[34] *Id.*, 62 F.3d at 1324.

allowing such a debtor to deny fraud in a subsequent § 523 action by blindly denying preclusive effect to a default judgment would reward abuse of the judicial process.[35]

The Third Circuit in *In re Docteroff*[36] in dischargeability litigation likewise applied the exception to the actually litigated element of collateral estoppel. Prepetition Debtor Docteroff was sued in federal court by Wolstein for fraud in the diversion of progress payments on the construction of a yacht. Default judgement was entered on liability after debtor "repeatedly and in bad faith refused to submit to properly noticed depositions or respond to numerous legitimate requests for the production of documents despite court orders and warnings."[37] On the day the trial on damages was to begin, Docteroff filed for relief under Chapter 11. In subsequent dischargeability litigation under §§ 523(a)(2)(A), (a)(4), and (a)(6) plaintiff alleged that debtor was estoppped from denying that he had defrauded and embezzled money in connection with the yacht construction contract. The bankruptcy court granted summary judgment to the creditor, and the district court affirmed. On appeal, the Third Circuit rejected Docteroff's assertion

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[35] *Id.*

[36] *Wolstein v. Docteroff (In re Docteroff)*, 133 F.3d 210 (3rd Cir.1997).

[37] *Id.*, 133 F.3d at 213.

that collateral estoppel did not apply because he did not actually litigate any issue in the prior law suit. The court stated:

> Docteroff had every opportunity to fully and fairly litigate any relevant issue in the district court. . . . Docteroff simply elected not to comply with court orders. This is not the typical default judgment where a defendant neglects or elects not to participate in any manner because of the inconvenience of the forum selected by the plaintiffs, the expense associated with defending the lawsuit, or some other reason. . . .
>
> We do not hesitate in holding that a party such as Docteroff, who deliberately prevents resolution of a lawsuit, should be deemed to have actually litigated an issue for purposes of collateral estoppel application. . . . To hold otherwise would encourage behavior similar to Docteroff's and give litigants who abuse the processes and dignity of the court an undeserved second bite at the apple. We reject such a result.[38]

The Court finds that Corey's behavior falls squarely within the rule of the foregoing cases. Collateral estoppel precludes Debtor from raising any defense to the allegation that Melnor's Virginia Judgment was for actual fraud for purposes of § 523(a)(2)(A). As found by the Virginia district court,

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[38] *Id.*, 133 F.3d at 215.

all of Debtor's defenses to the fraud claim were stricken because of his "overall failure to meaningfully participate in discovery," with "Corey's failure to appear at a single hearing . . . [being] the culmination of a course of obstructive behavior on the part of the defendants which has effectively prevented the court from proceeding to the merits of the underlying dispute."

The only case cited by Corey in support of his position that the Virginia Judgment has no preclusive effect is *In re Gilson.*[39] In that case, a default judgment was entered in post-petition federal district court litigation after debtor declined to participate in discovery or trial on damages to protect her Fifth Amendment rights. The bankruptcy court rejected the creditor's argument that collateral estoppel barred defense to a dischargeability complaint even though the issues of fraud and damages had not been actually litigated. The court distinguished *Daily* and *Bush* on the basis that debtor did not hinder and delay the judicial process, did not create unnecessary hurdles, did not create needless expenses, and

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[39] *Fed. Ins. Co. v. Gilson (In re Gilson),* 250 B.R. 226 (Bankr.E.D.Va.2000). An additional case where a default judgment was not given preclusive effect include *Elletson v. Riggle (In re Riggle),* 2007 WL 2332141 (D.Colo.2007) (only evidence of willfulness or bad faith proffered was bare assertion that the state court ordered sanctions for failure to comply with orders to compel discovery, where applicable state law permitted the imposition of sanctions for negligence).

expressed a legitimate motivation of protecting her Fifth Amendment rights.

Corey cannot similarly distinguish *Daily, Bush,* and the other cases discussed above. The record of abusive conduct is clear. Rather, Corey argues a technicality – that the Virginia Judgment is not a default judgment as a sanction for abusive conduct but is a default judgment for failure to appear for trial on damages. The Court rejects Corey's contention. This Court views the striking of all defenses as a sanction under Rule 37(d) as equivalent to the entry of a default judgment on liability for purposes of collateral estoppel. At that time, the Virginia Court could have entered judgment for the amount of the prayer, as did the court in *Daily,* and the resulting money judgment would have been entitled to preclusive effect. However, the Virginia court, like the trial court in *Docteroff,* elected to have a trial on damages. At Debtor's request, a jury was assembled, but Debtor did not appear. Compensatory damages (in an amount slightly less than the prayer), interest, and fees were determined by the court, and a judgment entered accordingly.

To hold that the resulting monetary judgment was a traditional default judgment not entitled preclusive effect because its immediate impetus was Debtor's failure to appear for trial would ignore the circumstances of the Virginia case. The failure of [sic] appear at the damage trial was an abuse of court process, the seriousness of which was compounded by Corey's established history of abusive conduct in the

case. A holding that the default judgment was for the everyday occurrence of failure to appear rather than abusive conduct would reward not only the discovery and pretrial preparation abusive conduct which resulted in the striking of defenses but also Debtor's abuse of court process by requesting a jury and then, without excuse, not appearing for trial. This later conduct, as well as the abusive conduct which preceded the formal entry of judgment, provide the basis for this Court to conclude that Debtor is precluded by the doctrine of collateral estoppel from litigating either his liability to Melnor for fraud or the amount of that liability.

C. CONCLUSION ON DISCHARGEABILITY OF MELNOR'S CLAIM.

For the foregoing reasons, the Court holds that Corey is collaterally estopped to challenge the fraud judgment entered by the Virginia court. Accordingly, Corey's motion to dismiss the § 523(a)(2)(A) count of the Complaint is denied and Melnor's motion for summary judgment on the § 523(a)(2)(A) nondischargeability of the claim for satisfaction of the Virginia Judgment is granted.

II. THE § 727(a)(4)(A) CLAIM FOR DENIAL OF DISCHARGE.

A. FINDINGS OF FACT ON THE § 727(a)(4)(A) CLAIM FOR DENIAL OF DISCHARGE BASED UPON FALSE STATEMENT UNDER OATH IN BANKRUPTCY SCHEDULE F.

The uncontroverted facts stated above with respect to the assertion of nondischargeability under § 523(A)(2)(A) provide the background for the § 727 objection to discharge. It is also uncontroverted that Debtor's Schedule F, creditors holding unsecured nonpriority claims, includes a joint debt owed to Melnor in the amount of $525,000 on a "business loan cosigned." Debtor's statement of financial affairs, in response to question 4, suits and administrative proceedings, executions garnishment and attachments, lists *Melnor Inc. v. SKR Resources & Christopher Corey,* with the Johnson County District Court case number. It also states that Melnor, Inc., whose address is in the schedules, seized property in December 2006.

Additional facts relevant to objection to discharge are controverted. Melnor, when moving for summary judgment, states, without citation to the discovery record or an affidavit: "At the time Corey signed the Petition, he knew that this entry was false and fraudulent, and that the debt owed to Melnor was not

for a 'business loan cosigned' but rather was for a Judgment entered by the Virginia Court for fraud.' "[40]

Corey controverts by affidavit. He states in part that the Virginia action involved a written contract dated July 19, 2003, that during a conversation at a deposition conference in the Virginia litigation counsel for Melnor told Corey that if he had written president by his name when signing the contract "none of this would be going on;" that Corey understood the nature of the case to be that he was liable because he signed on behalf of SKR without putting president by his name; that "Mr. Corey gave both the judgment and the contract to his bankruptcy counsel, David S. Adams, who prepared the Schedule F, and decided on the description of the debt; and that Mr. Corey truthfully stated his understanding of the nature of the obligation as arising from a written contract which he signed on behalf of SKR."[41]

In response, Melnor controverts Corey's statements regarding his understanding of the nature of the Virginia action by referring to the Virginia complaint. Corey's statement regarding the basis for his personal liability is also controverted by reference to the Virginia complaint which alleged that "because SKR was not and is not a properly existing corporate entity, Corey, as an officer, director and/or principal of

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[40] Doc. 17.

[41] Doc. 19.

SKR, is the alter ego of SKR and is personally liable for the debts and actions of SKR."[42]

B. ANALYSIS AND CONCLUSIONS OF LAW ON THE OBJECTION TO DISCHARGE PURSUANT TO § 727(a)(4)(A).

Both Melnor and Corey have moved for summary judgment on the objection to discharge count of the Complaint. The standard for summary judgment is well established. A motion for summary judgment will be granted if there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law.[43] The substantive law governing the claim determines which facts are material.[44]

Subsection 727(a)(4)(A), on which Melnor relies when objecting to Corey's discharge, provides that "the court shall grant the debtor a discharge, unless . . . the debtor knowingly and fraudulently, in or in connection with the case, made a false oath or account." "In order to deny a debtor's discharge pursuant to this provision, a creditor must demonstrate by a preponderance of the evidence that the debtor knowingly and fraudulently made an oath and that the oath relates to a material fact."[45] A common

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[42] Doc. 21.

[43] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

[44] *Id.*, 477 U.S. at 248.

[45] *Gullickson v. Brown (In re Brown)*, 108 F.3d 1290, 1294 (10th Cir.1997).

instance of "false oath" is when a debtor declares that under oath that schedules are true and correct and it appears that assets have been omitted or false statements made.[46] Neither honest errors nor mere inaccuracies are a proper basis for denial of discharge.[47] A false oath that has no effect on the estate is not grounds for denying discharge.[48]

In this case, Melnor's sole basis for objecting to discharge pursuant to § 727(a)(4)(A) is the characterization of Debtor's obligation to Melnor on the Virginia Judgment as a "business loan cosigned." Although the Court will assume for purposes of this analysis that the description of the obligation was false, the Court denies Melnor's motion for summary judgment for two reasons. First, there is a material issue of controverted fact concerning the requirement the false statement be made knowingly and fraudulently. Melnor relies upon Debtor's knowledge of the Virginia litigation as circumstantial evidence that the description was knowingly and fraudulently false. Melnor provides no affidavit or reference to the discovery record. Debtor responds by affidavit that he truthfully understood the stated nature of the judgment to be true. Debtor further states that his counsel, not he, determined the description of the obligation. Reasonable reliance upon the advice of

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[46] 6 *Collier on Bankruptcy* ¶ 727.04[2] (Alan N. Resnick & Henry J. Sommer eds.-in-chief, 15th ed. rev.2007).

[47] *In re Brown*, 108 F.3d at 1294.

[48] 6 *Collier on Bankruptcy* ¶ 727.04[1][b].

counsel is an accepted defense to a § 727(a)(4)(A) objection to discharge claim.[49]

Second, Melnor has not established that the alleged mischaracterization of the obligation is material. Melnor has presented no uncontroverted facts showing the materiality of whether the Virginia Judgment is characterized as a "business loan co-signed" or as a judgment for fraud arising from a business contract. There is no evidence that the case trustee or creditors were misled or that the estate was impacted. The lack of materiality of the description of the Melnor debt is enhanced by the fact that Debtor's Statement of Financial Affairs lists the judgment of Melnor Inc. against SKR Resources and Christopher Corey, giving the Johnson County District Court case number. The statement of affairs also reports the prepetition seizure of property by Melnor. The judgment and its relationship to the debt owed to Melnor are disclosed. Even if the description were found to have been knowingly and intentionally false, Melnor has provided no evidence that such a misdescription had any impact on the estate. Melnor's motion for summary judgment on its objection to discharge is denied.

Next, the Court addresses Debtor's cross motion for summary judgment on the objection to discharge.

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[49] *American State Bank v. Montgomery (In re Montgomery)*, 86 B. R. 948, 958 (Bankr.N.D.Ind.1988) (collecting numerous cases addressing the defense).

Summary judgment in favor of Debtor, who does not have the burden of proof, should be entered if the party objecting to discharge has insufficient evidence to prevail as a matter of law. The Debtor, as the moving party, bears the initial burden to establish its "presumptive entitlement to summary judgment in the absence of an adequate response by the non-movant."[50] "In moving for summary judgment against a party who will bear the ultimate burden of proof at trial, the movant's burden will be satisfied if he can point to an absence of evidence to support an essential element of the nonmoving party's claim."[51] "Once the movant has sustained this initial burden of production, the burden shifts to the nonmovant to show the court that there is in fact a genuine issue for trial"[52] and to "articulate a legal argument precluding summary judgment on the record before the court."[53]

As Melnor points out, Debtor's motion does not comply with the procedural requirements applicable to summary judgment motions with respect to the submission of a statement of uncontroverted facts in

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[50] 11 *Moore's Federal Practice-Civil* § 56.13[1] (2007), *citing Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) ("a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for the motion").

[51] *Goenaga v. March of Dimes Birth Defects Foundation*, 51 F.3d 14, 18 (2nd Cir.1995); *see Celotex Corp. v. Catrett*, 477 U .S. at 324-26.

[52] 11 *Moore's Federal Practice-Civil* § 56.13[2] (2007), *citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

[53] *Id.* at § 56.13[4].

support of his motion. This deficiency makes it difficult for the Court to determine the precise facts on which Debtor relies when moving for summary judgment. However, the record is clear as to the controverted and uncontroverted facts relating to Melnor's motion. Examination of the summary judgment pleadings provides no reason to find these same record facts should not determine consideration of Debtor's cross motion for summary judgment.

When responding to Melnor's motion and when moving for summary judgment, Debtor states by affidavit that Schedule F was prepared by bankruptcy counsel, not Debtor, and believed to be true. Melnor's reply brief argues that Debtor's belief is incredible in light of his participation in the Virginia litigation and that any reliance upon bankruptcy counsel was not reasonable based upon the Virginia Judgment, a copy of which Corey states was given to his attorney. With respect to the cross motion for summary judgment, as with the Melnor's motion for summary judgment, the Court finds material issues of disputed facts as to the element of Debtor's allegedly knowingly and fraudulent making a false statement. Summary judgment is seldom granted on issues of intent, and Debtor's affidavit is insufficient for him to be entitled to judgment as a matter of law on this question, given the inferences arising from Debtor's complete knowledge of the nature of the obligation.

In support of summary judgment, Debtor also argues that Melnor "cannot show, as a matter of law,

that the characterization of the debt was material to any issue in the bankruptcy or this [adversary] case."[54] In response, Melnor argues that the description is material because the subject matter of the statement relate to Corey's business transactions and dealings and "because it is the major unsecured debt of Corey."[55] The Court rejects Melnor's position. Melnor's view of the law improperly focuses on the subject matter of the statement, not the impact of the statement. Melnor has offered no evidence showing any impact on the estate, the case trustee, or creditors. Moreover, Melnor has provided no case authority that the mischaracterization of a single scheduled debt, however important, is ever a sufficient basis standing alone to deny discharge. The Court declines to find this one alleged misstatement material, particularly where more detail of the debt is disclosed in the Statement of Financial Affairs. Denial of discharge is a severe sanction which this Court rarely finds warranted. The facts of this case do not include the quality or quantity of fraudulent statements which this Court requires before depriving a debtor pursuant to § 2727(a)(4) of one of the primary benefits of Chapter 7.

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[54] Doc. 19.

[55] Doc. 21.

C. CONCLUSION ON OBJECTION TO DISCHARGE.

For the foregoing reasons, Corey is granted summary judgment on the § 727(a)(4)(A) allegation. Melnor has provided no evidence from which the Court could find that the alleged mischaracterization of the nature of the debt owed to Melnor is material, as required for denial of discharge.

CONCLUSION.

The Court holds that Melnor's claim against Corey for payment of the Virginia Judgment is excepted from discharge pursuant § 523(a)(2)(A). Because the Virginia Judgment was entered by default as a sanction for Debtor's abusive litigation conduct, collateral estoppel bars Corey from litigating whether the claim is a debt for money, property or services obtained by fraud and the amount of the debt. As to the dischargeability claim pursuant to § 523(a)(2)(A), Corey's motion to dismiss is denied, Melnor's motion for summary judgment is granted, and Corey's cross motion for summary judgment is denied.

Summary judgment is granted to Corey on the objection to discharge pursuant to § 727(a)(4)(A). The alleged mischaracterization of Melnor's claim for satisfaction of the Virginia Judgment is not a false statement knowingly and fraudulently made by Corey that relates to a material fact. Melnor's motion for summary judgment on the objection to discharge count is denied.

Melnor's motion for leave to file an amended complaint is denied as moot. The Court has disposed of the Complaint by granting Melnor's dischargeablity count and granting Corey summary judgment of the objection to discharge count.

The foregoing constitute Findings of Fact and Conclusions of Law under Rule 7052 of the Federal Rules of Bankruptcy Procedure which makes Rule 52(a) of the Federal Rules of Civil Procedure applicable to this matter. A judgment based upon this ruling will be entered on a separate document as required by Federal Rule of Bankruptcy Procedure 9021 and Federal Rule of Civil Procedure 58.

IT IS SO ORDERED.

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No. 09-785

In the

Supreme Court of the United States

CHRISTOPHER F. COREY,

Petitioner,

v.

MELNOR, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF IN OPPOSITION

Thomas Moore Lawson
Counsel of Record
Joshua E. Hummer
LAWSON AND SILEK, P.L.C.
P.O. Box 2740
Winchester, VA 22604
(540) 665-0050
tlawson@lsplc.com

Counsel for Respondent

*Gibson*Moore Appellate Services, LLC
421 East Franklin Street • Suite 230 • Richmond, VA 23219
804-249-7770 • www.gibsonmoore.net

COUNTERSTATEMENT OF QUESTION PRESENTED

Whether a federal district court striking a defendant's defenses and entering judgment against the defendant as a sanction for the defendant's obstruction of the judicial proceedings in a fraud action collaterally estops the defendant from denying the fraud in a later bankruptcy case brought by the defendant?

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Melnor, Inc. declares that it is not a publicly held corporation. Melnor, Inc. is unsure of the meaning of "parent" corporation; however, Nies Holding, LLC and Marvelous Time Company, Ltd. are stockholders of Melnor, Inc. No publicly held corporation owns 10% or more of Melnor, Inc.'s stock.

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STATEMENT OF THE CASE

On December 17, 2004, Melnor, Inc. ("Melnor") filed a complaint against Christopher A. Corey ("Corey") and SKR Resources, Inc., ("SKR") in the United States District Court of the Western District of Virginia (the "Virginia District Court"), alleging fraud, unjust enrichment, and constructive fraud (the "Virginia Fraud Action"). Melnor also alleged that SKR was a defunct entity and the *alter ego* of Corey and that Corey was personally liable for the debts and actions of SKR. *See* Petitioner's App. 37-38. The essence of the complaint was that SKR and Corey had induced Melnor by false representations to transfer to SKR and Corey goods worth approximately $435,000.00, and both SKR and Corey had subsequently failed to fulfill their promises to compensate Melnor for those goods. *Id.*

SKR made an appearance in the case by its counsel, Steffanie J. Lewis, who also represented Corey and, on Corey's behalf, contested the jurisdiction of the Virginia District Court over him, as evidenced by a motion to dismiss filed on or around August 18, 2005. *Id.* at 38. By a letter dated September 15, 2005, Corey requested that Ms. Lewis withdraw as counsel for SKR. *Id.* This letter is but one example of the fact that Corey acted for both himself and for SKR during the Virginia Fraud Action.

By a Memorandum Opinion dated November 10, 2005 and a Judgment Order and a Memorandum Opinion dated November 21, 2005, the Virginia District Court entered a default judgment against SKR. *See id.* at 38-39. Later, on April 5, 2006, the Virginia District Court entered a Final Judgment

Order against SKR that included an award of attorneys' fees. *See id.*

On December 9, 2005, the Virginia District Court entered a written order allowing Ms. Lewis to withdraw as counsel for Corey. *Id.* at 38. On December 12, 2005, Corey, acting *pro se*, filed an answer for himself in the case. *Id.* at 39. He continued to represent himself, answering discovery, making discovery requests, requesting a jury trial, subpoenaing documents from third parties, filing a motion to compel the production of documents, and filing a list of witnesses in preparation for trial. *See id.* at 18.

While represented by Ms. Lewis and also while proceeding *pro se*, Corey repeatedly obstructed the legal proceedings in the Virginia Fraud Action. He refused to respond to Melnor's discovery forcing Melnor to file two Motions to Compel. When he finally responded, his responses were inadequate and calculated to prohibit Melnor from completing its discovery. *See id.* at 18. He also refused to appear for his deposition until the Virginia District Court entered an order compelling it. He specifically requested March 28, 2006 as a date for a hearing, then failed to appear, requiring counsel for Melnor to travel two and one half hours one way from Winchester, Virginia to Charlottesville, Virginia. *See id.* at 18-19. After Corey's failure to appear at the March 28, 2006 hearing, and in response to all of his inappropriate and obstructive actions, the magistrate Judge issued a Report and Recommendation on March 30, 2006, in which it recommended that Corey's defenses be struck as a sanction for his obstruction. *Id.* at 39-40. In the Report and Recommendation, the magistrate Judge

stated that "the monetary sanctions heretofore endorsed are not adequate" and that "Corey's conduct almost blatantly caused plaintiff to incur expenses preparing and attending the hearing, and finally noting that "there have been prior occasions when matters were set before the court which Corey sought to avoid." *Id.*

In accordance with the recommendation of the magistrate judge, the Virginia District Court issued an order dated May 4, 2006, by which the Virginia District Court struck Corey's defenses "as a sanction for Corey's failure to appear at a scheduled hearing and for Corey's overall failure to meaningfully participate in discovery." *Id.* at 40-41. The Virginia District Court further stated

> that this sanction is not simply a response to Corey's failure to appear at a single hearing but, rather, is the culmination of a course of obstructive behavior on the part of the defendants which has effectively prevented the court from proceeding to the merits of the underlying dispute. . . . [T]he record reflects a pattern of behavior on the part of the defendants seemingly aimed at preventing the court from ever reaching the merits of [Melnor's fraud claim]. . . . The record shows that Corey has obstructed the course of discovery by preventing the court from setting and completing essential hearings and by attempting to excuse his behavior by incredibly asserting that he has not received the court's notices. The court finds that striking Corey's defenses and moving forward to the issue of damages is the only way the court can advance this case toward its

> ultimate resolution. The court is satisfied that any lesser sanction would only enable further delays by Corey. Accordingly, the court **ADOPTS** [the magistrate judge's] Report and Recommendation in its entirety and hereby **STRIKES** Corey's defenses.

Id. at 40-41 (emphasis in original).

The Virginia District Court set the matter for trial on May 23, 2006, a date which Corey had previously advised the court was convenient, on the sole remaining issue of damages, the issue of fraud having been completely resolved by the order of May 4, 2006. *See id.* at 41. The trial was to be a jury trial, Per the request of Corey, the issue of damages was to be tried before a jury. *Id.* On the date of trial, however, Corey did not appear. *Id.*

In a Memorandum Opinion dated May 24, 2006, the Virginia District Court noted that it had "struck Corey's defenses as a sanction for his course of obstructive behavior." *Id.* at 20. The Virginia District Court then noted that by his failure to appear at trial, Corey was in default on the issue of damages as well. *See id.* at 20-21. In adjudicating an award of interest, the Virginia District Court further noted: "in light of the course of dealing to which Corey has effectively admitted and in light of the fact that Corey has unjustifiably retained Melnor's otherwise sellable goods, the court finds that such an award is appropriate here." Finally, the Virginia District Court noted that Virginia law permits an award of

> reasonable attorneys fees to a successful plaintiff in a fraud action. [Citation omitted.] By virtue of Corey's default, Melnor has

> succeeded in their fraud action, and, in light of the complexity and duration of the case and the unnecessarily protracted course of litigation Corey's actions have yielded, the court . . . will award Melnor its attorneys fees.

In accordance with this Memorandum Opinion, the Virginia District Court entered a Judgment Order against Corey on May 24, 2006, in the amount of $428,624.07, plus interest, and awarded attorneys' fees in the amount of $94,357.84. *Id.* at 41-42. The Virginia District Court further noted that Corey's liability was joint and several with the liability of SKR, under the judgment issued in relation to SKR on April 5, 2006.

After entering judgment against Corey, the Virginia District Court further sanctioned him based on his failure to appear for trial without notice to the court after he requested that the court assemble a jury. As a sanction for this failure, the Virginia District Court ordered that Corey also be taxed the jury costs.

Melnor recorded the judgment in Kansas on July 17, 2006. *Id.* at 42. Subsequently, Corey filed for bankruptcy protection under Chapter 7 on March 8, 2007 (the "Bankruptcy Action") in the United States Bankruptcy Court for the District of Kansas (the "Bankruptcy Court"). *See id.*

On May 23, 2007, Melnor filed an adversary proceeding in the Bankruptcy Action and made two arguments. *See id.* at 34-36. First, Melnor argued that pursuant to 11 U.S.C. § 727(a)(4)(A), Corey was not entitled to a discharge of the default judgment from the Virginia Fraud Action because Corey made a false representation in his bankruptcy petition by

stating that the default judgment from the Virginia Fraud Action was actually a "business loan cosigned." *Id.* at 35-36. Second, Melnor argued that pursuant to 11 U.S.C. § 523(a)(2)(A), the default judgment from the Virginia Fraud Action was nondischargeable in bankruptcy, because it represented a debt for property obtained by fraud. *Id.* Melnor further argued as part of this second argument that the default judgment from the Virginia Fraud Action collaterally estops Corey from denying fraud in the Bankruptcy Action. *Id.*

Corey responded with a motion to dismiss. *Id.* at 36. Melnor subsequently filed a motion for summary judgment. *Id.* Melnor also attached an amended complaint to the motion for summary judgment and requested leave to file the amended complaint in the unlikely event that the Bankruptcy Court did not issue an order declaring the default judgment from the Virginia Fraud Action to be nondischargeable. *See id.* Corey responded with a cross-motion for summary judgment. After considering the arguments, the Bankruptcy Court issued a Memorandum Opinion and a Judgment Order on December 21, 2007 ("Memorandum Opinion"). *Id.* at 34-66.

On the false representation issue raised pursuant to 11 U.S.C. § 727(a)(4)(A), the Bankruptcy Court granted Corey's motion for summary judgment and denied Melnor's motion for summary judgment. *Id.* at 65. Melnor did not appeal this decision.

However, on the collateral estoppel issue raised pursuant to 11 U.S.C. § 523(a)(2)(A), the Bankruptcy Court granted Melnor's motion for summary judgment and denied Corey's motion to dismiss and

Corey's cross-motion for summary judgment. *Id.* The Bankruptcy Court expressly stated that the default judgment against Corey in the Virginia Fraud Action "***was entered by default as a sanction for [Corey's] abusive litigation conduct,***" and therefore "collateral estoppel bars Corey from litigating whether the claim is a debt for money, property or services obtained by fraud and the amount of the debt." *Id.* (emphasis added).

From the Bankruptcy Court's decision disposing of the issues raised pursuant to 11 U.S.C. § 523(a)(2)(A), Corey filed an appeal to the United States Bankruptcy Appellate Panel of the Tenth Circuit ("BAP"). *See id.* at 10-11. The parties submitted briefs and presented oral argument to the BAP. The BAP subsequently affirmed the judgment of the Bankruptcy Court stating that

> it is undisputed that the Virginia District Court found Corey's litigation tactics, including his failure to appear at trial, seriously obstructive, resulting in the entry of the Virginia Judgment adverse to Corey.

Id. at 31. The BAP ultimately concluded that the Bankruptcy Court did not abuse its discretion in finding that collateral estoppel applied and the "Virginia Judgment precluded relitigation of the issues of fraud and damages in the Section 523(a)(2) proceeding." *Id.* at 32-33.

Corey then appealed the BAP's decision to the United States Court of Appeals for the Tenth Circuit. *Id.* at 1-2. The Tenth Circuit, in turn, affirmed the Bankruptcy Court's decision, holding that "Mr. Corey actually litigated Melnor's fraud claim" and "the default was not entered because of

Mr. Corey's failure to contest the issue but rather because his efforts in contesting it were abusive." *Id.* at 2.

From the Tenth Circuit's affirmation of the Bankruptcy Court's decision, Corey filed his Petition for Writ of Certiorari to this Court.

REASONS FOR DENYING THE PETITION

The Petition for Writ of Certiorari ("Petition") should be denied because (a) Corey's argument is based on a factual dispute with the findings of fact made by the Bankruptcy Court, and (b) the Tenth Circuit's decision is well-reasoned, it is consistent with the decisions of all the other Circuit Courts which have considered this issue, and it is supported by sound public policy.

I. COREY'S ARGUMENT IS BASED ON A FACTUAL DISPUTE WITH THE FINDINGS OF FACT MADE BY THE BANKRUPTCY COURT.

Melnor disputes Corey's recitations of facts in his Statement of the Case. As stated in Melnor's Statement of the Case, the Bankruptcy Court expressly found that the judgment entered against Corey in the Virginia Fraud Action "was entered by default as a sanction for [Corey's] abusive litigation conduct." *Id.* at 65. Both the BAP and the Tenth Circuit recognized and confirmed this factual finding by the Bankruptcy Court. *See id.* at 2, 31.

Nevertheless, Corey disputes this finding of fact. In the Petition, Corey claims that the default judgment in the Virginia Fraud Action was instead entered "for not appearing at trial" and that the "judgment [in the Virginia Fraud Action] was not entered as a sanction of any kind." Petition 6.

Corey's arguments in the Petition are based on this disputed fact. He argues that collateral estoppel should not apply in this case because there was never any "bad intent or deliberate obstruction" on his part. *Id.* at 16. Corey also repeatedly argues

that Melnor's fraud claim in the Virginia Fraud Action was not litigated in complete disregard to the Bankruptcy Court's finding that his obstructive behavior prevented it from being litigated. *See id.* at 6, 16-17. Furthermore, all the cases on which he relies in the Petition involve defendants who had default judgments entered against them, not because they were sanctioned for obstructing the litigation, but because they simply stopped litigating. *See id.* at 11-17; *Federal Insurance Company v. Gilson (In re Gilson)*, 250 B.R. 226, 235 (Bankr. E.D. Va. 2000) (finding that besides not responding to discovery, debtor did not hinder or delay the judicial process); *Marlee Electronics Corp. v. Antonakis (In re Antonakis)*, 207 B.R. 201, 206 (Bankr. E.D. Ca. 1997) (finding that the debtor in that case "did not engage in any abuse of the judicial process").

All of these arguments by Corey are undermined by the factual finding of the Bankruptcy Court that the judgment against Corey was entered as a sanction for his "abusive litigation conduct" after the Virginia Court found that Corey's "obstructive behavior... has effectively prevented the [Virginia] court from proceeding to the merits of the underlying dispute." Petitioner's App. 40-41. This finding by the Bankruptcy Court may only be reversed if it is "clearly erroneous" and Corey has not so argued. *See* Fed. R. Civ. P. 52(a). Since Corey's arguments in the Petition are based on a dispute of fact, Melnor respectfully requests that the Petition be denied.

II. THE TENTH CIRCUIT'S DECISION IS WELL-REASONED.

This Court has previously held that collateral estoppel or issue preclusion applies "when an issue

of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment." *Arizona v. California*, 530 U.S. 392, 414, 120 S. Ct. 2304, 147 L. Ed. 2d 374 (2000) (quotations omitted). Applying this rule in its decision on this matter, the Tenth Circuit distinguished between default judgments entered for failure to contest an issue, which do not satisfy the "actually litigated" requirement, and default judgments entered as a sanction for abusive litigation tactics. Petitioner's App. 4-5. The Tenth Circuit then affirmed the factual findings of the Bankruptcy Court above and held that the judgment against Corey in the Virginia Fraud Action "was not entered because of Mr. Corey's failure to contest the issue but rather because his efforts in contesting it were abusive." *Id.* at 2, 3. As a result, the Tenth Circuit held that "Mr. Corey actually litigated Melnor's fraud claim" in the Virginia Fraud Action and issue preclusion precluded him from "contesting in this adversary proceeding that he committed fraud." *Id.* at 2, 9.

A. The Tenth Circuit's decision is consistent with the decisions of all other circuit courts which have considered this issue.

All other federal circuit courts which have heard similar cases have reached the same conclusion as the Tenth Circuit in this case. In *FDIC v. Daily (In re Daily)*, 47 F.3d 365 (9th Cir. 1995), the Ninth Circuit held that "a party who deliberately precludes resolution of factual issues through normal adjudicate procedures may be bound, in subsequent, related proceedings involving the same parties and issues, by a prior judicial determination reached without completion of the usual process of

adjudication." *Id.* at 368. The Ninth Circuit further held that the actually litigated requirement of collateral estoppel discussed above may be satisfied in such a situation. *Id.*

In *Wolstein v. Docteroff (In re Docteroff)*, 133 F.3d 210 (3rd Cir. 1997), the Third Circuit held that the actually litigated requirement of collateral estoppel was satisfied by a default judgment entered because the defendant had "decided to frustrate orderly litigation by willfully obstructing discovery." *Id.* at 215.

In *Bush v. Balfour Beatty Bahamas, Ltd. (In re Bush)*, 62 F.3d 1319 (11th Cir. 1995), the Eleventh Circuit held that it was within the sound discretion of the trial court to apply collateral estoppel to prevent re-litigation of an issue when a debtor, in the previous litigation, engaged in "dilatory and deliberately obstructive conduct and a default judgment, based on fraud, was entered as a sanction against him." *Id.* at 1324-25.

Corey does not attempt to factually distinguish these cases from his own, and he admits that there is no circuit split in this matter. Instead, he implies that there is a split between two bankruptcy courts (*Gilson* and *Marlee*), and the four circuit courts listed above and this split warrants this Court granting his Petition. *See* Petition 19. However, he ignores the salient distinguishing fact of the *Gilson* and *Marlee* cases not present here. Specifically, in both *Gilson* and *Marlee*, there was no finding of any obstructive or abusive behavior on the part of the defendant. *See Gilson*, 250 B.R. at 230-31, 35; *Marlee*, 207 B.R. at 206. In this case and those before the circuit courts listed above, the default judgment was

entered as a result of obstructive and/or abusive litigation behavior. Petitioner's App. at 2; *Docteroff*, 133 F.3d at 215; *Bush*, 62 F.3d at 1324; *Daily*, 47 F.3d at 368. Furthermore, Melnor respectfully suggests that even if there was a true dispute between a bankruptcy court and multiple circuit courts, the circuit courts are capable of resolving such a dispute without burdening this Court with the matter.

B. The Tenth Circuit's decision is supported by sound public policy.

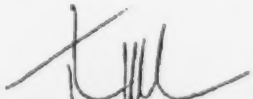
In addition to being supported by the other circuit courts' decisions listed above, the Tenth Circuit's opinion in this matter is also supported by public policy considerations. If Melnor's fraud claim must be relitigated in the Bankruptcy Court, then Corey will be rewarded for his flagrant abuse of the judicial system, and Melnor will be prejudiced by having to litigate the fraud claim all over again.

If Melnor is forced to relitigate the fraud claim, then the efficiency of the court system will be undermined and other defendants in fraud actions will have an incentive to be as recalcitrant and uncooperative as possible in the hope of gaining a benefit from abusing the judicial process. The doctrine of collateral estoppel helps prevent this type of abuse of the judicial system and it should be applied in this case.

CONCLUSION

For the reasons set forth above, Melnor respectfully asks this Court to deny the Petition.

Respectfully submitted,



Thomas Moore Lawson Esquire
Counsel of Record
Joshua E. Hummer, Esquire
Lawson and Silek, P.L.C.
P.O. Box 2740
Winchester, VA 22604
Telephone: (540) 665-0050
Facsimile: (540) 722-4051
Counsel for Respondent
Melnor, Inc.